Indian Claims Commission

'Namgis First Nation

Report on: Cormorant Island Inquiry

MARCH 1996

Indian Claims Commission

Commission des revendications des Indiens

March 29, 1996

Chief and Council
Namgis First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Namgis First Nation
Cormorant Island Claim

The Namgis First Nation initiated proceedings before this Commission by letter dated November 4, 1994, from Stan Ashcroft, Counsel for the Namgis First Nation, to the Commissioners of the Indian Claims Commission. On March 3, 1995, the Commission advised the Government of Canada and the Chief and Council of the Namgis First Nation that it would conduct an inquiry into the Government's rejection of the specific claim of this First Nation.

The Commission has reviewed hundreds of pages of documents related to this inquiry. In addition to this review, the Commission held an information gathering session at Alert Bay on April 20 and 21, 1995, where we heard directly from the elders. The Commissioners heard oral submissions from counsel for the parties on the legal issues raised in this inquiry on September 20 and 21, 1995, in Vancouver.

CANADA

Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

As set out in Recommendation 3 in the Commission's Annual Report for 1994/95, we will be arranging for a meeting of the parties to respond to this Report within 90 days of the date of this letter. The government response should contain detailed reasons for the acceptance or rejection of our recommendation and include a precis of any fresh legal opinion received from the Department of Justice.

Our review of the history of this claim, and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Daniel J. Bellegarde Commission Co-Chair	Aurélien Gill Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CORMORANT ISLAND CLAIM OF THE 'NAMGIS FIRST NATION

PANEL

Commission Co-Chair P.E. James Prentice
Commission Co-Chair Daniel J. Bellegarde
Commissioner Aurélien Gill

COUNSEL

For the 'Namgis First Nation
Stan H. Ashcroft

For the Government of Canada
Bruce Becker / Rosemarie Schipizky

To the Indian Claims Commission
Kim Fullerton / Isa Gros-Louis Ahenakew / Donna Jordan

March 1996

CONTENTS

PART I	**INTRODUCTION**	1
PART II	**THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY**	3
	THE MANDATE OF THE INDIAN CLAIMS COMMISSION	3
	THE SPECIFIC CLAIMS POLICY	5
	Scope of the Specific Claims Policy	5
PART III	**THE INQUIRY**	7
	THE CLAIMANT AND THE CLAIM AREA	7
	HISTORICAL BACKGROUND	9
	The Indian Reserve Commission	9
	Cormorant Island and the Huson Lease	26
	ORAL TESTIMONY: OCCUPATION AND USE OF CORMORANT ISLAND	40
PART IV	**ISSUES**	47
PART V	**ANALYSIS**	49
	ISSUE 1	49
	The Orders in Council	49
	Submissions of the Parties	51
	Terms of Dominion Order in Council 170	52
	Case Law	53
	Existence of a "Difference"	61
	ISSUE 2	62
	Submissions of the Parties	62
	Public versus Private Law Duty	65
	Determining the Existence of a Fiduciary Obligation	69
	Application of the *Frame v. Smith* Guide	75
	ISSUE 3	76

ISSUE 4 77
Submissions of the Parties 77
Reasonableness of Canada's actions 78

ISSUE 5 87
Submissions of the Parties 87
Outcome of a Referral to a Judge 88

ISSUE 6 92

ISSUE 7 93
Submissions of the Parties 93
Scope of "Lawful Obligation" 96
Status of the Orders in Council 97
Interpretation of the Policy 100

PART VI FINDINGS AND RECOMMENDATION 101

APPENDICES

A The 'Namgis First Nation Cormorant Island Inquiry 105

PART I

INTRODUCTION

In January 1880 Indian Reserve Commissioner G.M. Sproat allocated more than 1000 acres of Cormorant Island as a reserve for the 'Namgis First Nation. This allocation was disallowed two years later by the Chief Commissioner of Lands and Works for the province of British Columbia, one of the grounds being that the entire island had been leased since 1870 to a group of white settlers. On October 20, 1884, Indian Reserve Commissioner Peter O'Reilly, Mr. Sproat's successor, reallocated two reserves on Cormorant Island. These reserves, however, ultimately encompassed only 48.12 acres.

In September 1987 the 'Namgis First Nation submitted a specific claim to the Office of Native Claims. It contended, among other things, that Canada had acted improperly in failing to refer the disallowance of Mr. Sproat's allocation to a judge of the British Columbia Supreme Court, as was provided in the Order in Council and in related documentation appointing Mr. Sproat as Indian Reserve Commissioner. Canada rejected the claim in April 1994. As a result, the 'Namgis First Nation turned to the Indian Claims Commission "for appeal purposes." In March 1995 the Commission agreed to conduct an inquiry into the rejection of the Cormorant Island claim.

The Indian Claims Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Our task in this inquiry was to examine the claim of the 'Namgis First Nation and to assess its validity on the basis of Canada's Specific Claims Policy.

This report sets out our findings and recommendations to the First Nation and to Canada. The structure of the report is as follows: Part II outlines the mandate of the

Commission; Part III summarizes the inquiry and the historical background; Part IV sets out the issues; Part V contains our analysis of the facts and the law; and Part VI states our findings and recommendation.

The Commission has been assisted in its task by legal counsel for the First Nation and for Canada, who provided detailed written and oral submissions on the evidence and the law. We wish to thank them for their careful preparation of the arguments and materials. We also wish to express our gratitude to the people of the 'Namgis First Nation for the warm welcome extended to us and our staff during our visit to their community and for the facilities they made available for the conduct of this inquiry.

PART II

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[1]

This is an inquiry into a claim that has been rejected. The claimant is the Namgis First Nation, formerly known as the Nimpkish Indian Band. A brief synopsis of how the claim came before this Commission follows.

On September 3, 1987, Chief Pat Alfred submitted band council resolutions for four specific claims to the Office of Native Claims. One of these claims related to the Cormorant Island Reserve.[2] On April 5, 1994, Nola Landucci, Specific Claims

---

[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[2] Chief Pat Alfred, Nimpkish Band Council, to Manfred Klein, Negotiator, Specific Claims, Office of Native Claims, September 3, 1987 (ICC Documents, p. 308).

Negotiator, Indian and Northern Affairs Canada, wrote to Stan Ashcroft, legal counsel for the claimant, and confirmed that Canada had rejected the Cormorant Island claim:

> It would be accurate to advise your client that Canada's analysis of this matter does not support negotiation of any probable breach of obligation under the Specific Claims policy. The claim can therefore accurately be described as rejected.[3]

By letter dated November 4, 1994, Mr. Ashcroft, on the instructions of the Chief and Council of the 'Namgis First Nation, submitted the Cormorant Island claim to the Indian Claims Commission "for appeal purposes."[4] A planning conference was held on January 31, 1995, followed by the Commissioners' review of the claim in early March 1995. On March 3, 1995, Daniel Bellegarde and James Prentice, Co-Chairs of the Indian Claims Commission, wrote to the Chief and Council of the First Nation, to the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and to the Honourable Allan Rock, Minister of Justice and Attorney General, advising that the Commissioners had agreed to conduct an inquiry into the rejection of the Cormorant Island Claim.[5]

Under its mandate, the purpose of the Commission in conducting this inquiry is to inquire into and report on whether, on the basis of Canada's Specific Claims Policy, the 'Namgis First Nation has a valid claim for negotiation.

---

[3] Nola Landucci, Specific Claims Negotiator, Department of Indian and Northern Affairs, to Stan Ashcroft, April 5, 1994 (ICC Documents, p. 413).

[4] Stan H. Ashcroft to Kim Fullerton, Chief Legal Counsel, Indian Claims Commission, November 4, 1994 (ICC file 2109-05-1).

[5] Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nimpkish Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, March 3, 1995 (ICC file 2109-05-1).

THE SPECIFIC CLAIMS POLICY

The Indian Claims Commission is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That Policy is set forth in a 1982 booklet published by the Department of Indian Affairs entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[6] Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

Scope of the Specific Claims Policy

Although the Commission is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada concentrated on three passages in particular.[7] First, the opening sentence in *Outstanding Business*:

> The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.[8]

Second, the definition of the term "specific claims" on page 19 of the Policy:

> As noted earlier the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration

---

[6] Department of Indian Affairs and Northern Development (DIAND), ***Outstanding Business: A Native Claims Policy – Specific Claims*** (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as ***Outstanding Business***].

[7] Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 21-22.

[8] ***Outstanding Business***, 3.

of land and other Indian assets and to the fulfillment of Indian treaties.[9]

Third, the discussion of the concept of "lawful obligation" on page 20:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[10]

It is Canada's position that the Cormorant Island claim does not fall within the scope of the Specific Claims Policy. We will address this issue in Part V below.

---

9 *Outstanding Business*, 19.

10 *Outstanding Business*, 20.

PART III

THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the 'Namgis First Nation. Our investigation into this claim included the review of two volumes of documents submitted by the parties, as well as numerous exhibits, including two large binders of materials relating to the West Coast Indian reserve allotments of Commissioner Sproat.[11] In addition, the Commission held an information-gathering session in the community of Alert Bay, British Columbia, on April 20 and 21, 1995, where we heard evidence from six witnesses. On September 20 and 21, 1995, legal counsel for both parties made oral submissions in Vancouver, British Columbia. Details of the inquiry process and the formal record of documents and testimony considered in this inquiry can be found in Appendix A.

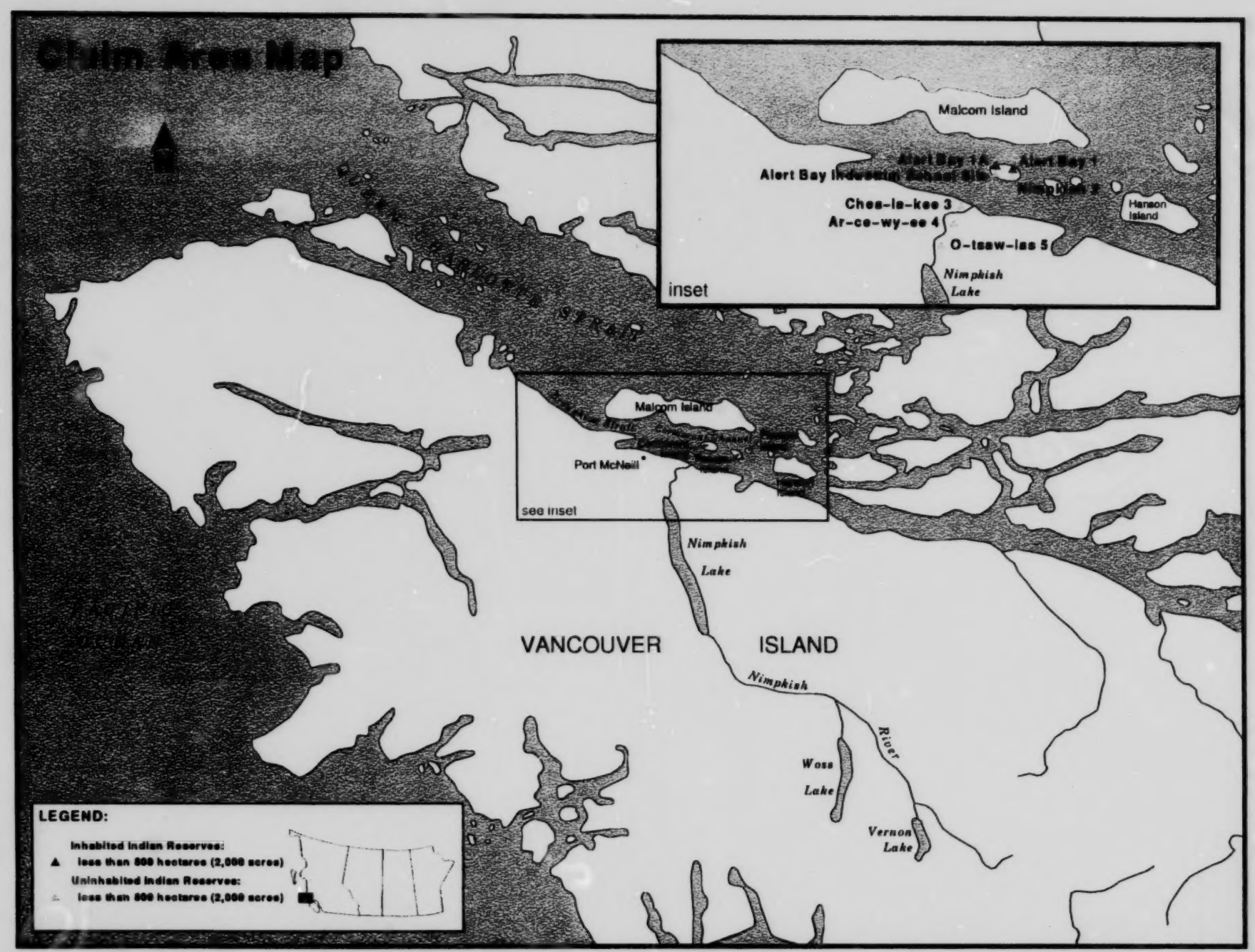
THE CLAIMANT AND THE CLAIM AREA

The people of the 'Namgis First Nation are part of the Kwakwaka'wakw, which is the Kwak'wala language group.[12] They have been referred to by several names historically, including Nimkeesh, Nimkish, and Nimpkish. Their traditional territory is on the northeastern coast of Vancouver Island, bounded by the watershed of the Nimpkish River and the adjacent marine environment.

---

[11] Blake Evans, "Gilbert Malcolm Sproat; Indian Reserve Commissioner for British Columbia. West Coast Indian Reserve Allotments (1879 - 80)," vols. 1 and 2, July 19, 1995 (ICC Exhibit 2).

[12] Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 14.


Claim Area Map
Malcom Island
Alert Bay 1A
Alert Bay 1
Alert Bay Indonesian School Site
Nimpkish 2
Hanson Island
Ches-la-kee 3
Ar-ce-wy-ee 4
O-tsaw-las 5
Nimphish Lake
inset
Malcom Island
Port McNeill
see inset
Nimphish Lake
VANCOUVER ISLAND
Nimphish River
Woss Lake
Vernon Lake
LEGEND:
Inhabited Indian Reserves:
less than 800 hectares (2,000 acres)
Uninhabited Indian Reserves:
less than 800 hectares (2,000 acres)

This particular claim relates to a reserve allocation on Cormorant Island, which is located in the Queen Charlotte Strait, between Vancouver Island and the mainland. In the language of the 'Namgis First Nation, Cormorant Island is called "Yalis," which means "safe haven.[13]

HISTORICAL BACKGROUND

One of the primary allegations in this claim is that Canada failed to adhere to the terms of the Order in Council appointing Mr. Sproat as Indian Reserve Commissioner. Therefore, by way of background, we will first briefly review the Orders in Council and some of the other salient documents relating to the creation and operation of the various Indian Reserve Commissions in the 1870s and 1880s. We will then discuss the specific circumstances surrounding the reserve allocation on Cormorant Island.

The Indian Reserve Commission

In 1871 the colony of British Columbia entered the nascent Canadian Confederation. The British Columbia *Terms of Union, 1871,* was the document by which the colony joined Canada. Article 13 of the *Terms of Union* specifically addressed the matter of Indians and Indian lands:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to

---

[13] ICC Transcript, April 21, 1995, p. 2 (George Cook).

> appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[14]

In the years following British Columbia's entry into Confederation, the Indian land question would prove to be one of the more contentious issues between the two levels of government, as each sought to impose its view of Indian land requirements on the other. In 1875, in response to a proposal put forward by William Duncan, a missionary at Metlakatla, the two governments agreed to the formation of a joint commission to resolve the problem of reserve allotment in British Columbia.[15]

In a memorandum of November 5, 1875, R.W. Scott, Acting Minister of the Interior, recommended:

> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.
>
> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same

---

[14] RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

[15] Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing Co., 1972), 183. See also Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 175-99.

> language) in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.
>
> 3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. . . .[16]

Acting upon Scott's recommendations, the dominion government authorized the creation of the Joint Reserve Commission by Order in Council 1033, dated November 10, 1875.[17] On January 6, 1876, the provincial government, concurring with the creation of the Joint Reserve Commission, issued a reciprocal Order in Council.[18] The commission was composed of A.C. Anderson, representing Canada, A. McKinlay, representing British Columbia, and G.M. Sproat, who served as Joint Commissioner.[19]

---

[16] Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, pp. 42-48).

[17] Federal Order in Council PC 1033, November 10, 1875 (ICC Documents, p. 49a).

[18] Provincial Order in Council No. 1138, January 6, 1876 (ICC Documents, pp. 50-51).

[19] Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 189.

Unfortunately, the Joint Reserve Commission was a short-lived venture, for the province argued that it was too expensive and too time consuming. In January 1877 A.C. Elliott, Provincial Secretary for British Columbia, wrote to the Minister of the Interior suggesting that the activities of the Joint Reserve Commission be restricted:

> I should recommend that, whilst the Commission as now constituted be allowed for the present to persevere, their labours should be entirely confined to places where the Whites and Natives are living in close proximity, and to those localities where the Indians are dissatisfied with the area of land of which they now hold possession.[20]

He also suggested that the commission, which he described as "elaborate and cumbersome," be dissolved towards the close of the then current year. Mr. Elliott recommended that, in the future, the Superintendents of Indian Affairs in their respective localities be responsible for apportioning all the lands remaining unallotted or unreserved. He continued:

> The lands thus apportioned should however be subject to the approval of the Chief Commissioner of Lands and Works, acting on behalf of the Provincial Government before being finally Gazetted as Indian Reserves. In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendents of Indian Affairs as to size or extent of lands to be allotted to any Indian Tribe, the matter could be referred to one of the Judges of the Supreme Court, whose decision should be final.[21]

---

[20] A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, National Archives of Canada [hereinafter NA], RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

[21] A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

Elliott's letter was followed by a provincial Order in Council, dated January 30, 1877, adopting his recommendations.[22]

Initially, Canada agreed to Elliott's suggested arrangement and on February 23, 1877, it passed an Order in Council endorsing his proposals. The federal Order in Council reads, in part:

> [A]fter the dissolution of the Commission the Superintendents of Indian Affairs in their respective localities should apportion as soon as practicable all the lands remaining unallotted or unreserved by the present Commission, such apportionment to be subject to the approval of the Chief Commissioner of Lands and Works of British Columbia acting on behalf of the Local Government, and in the event of any difference between the Superintendents and the Chief Commissioner as to the extent or locality of the lands to be allotted, the matter might be referred to one of the Judges of the Supreme Court of that Province whose decision should be final.[23]

British Columbia responded with another Order in Council on February 4, 1878:

> [T]he Indian Land Commissioners . . . have nearly completed their season's work and as the Commission is very expensive and under existing circumstances unnecessary he [the Provincial Secretary] recommends that the following telegram be transmitted by His Excellency the Lieutenant Governor to the Secretary of State for the Dominion of Canada.

---

22 Provincial Order in Council, January 30, 1877 (ICC Documents, p. 56).

23 Federal Order in Council, February 23, 1877 (ICC Documents, pp. 59-61).

> "Government wish arrangement approved by order Privy Council 23rd February last respecting Indian Land Commissioners to take effect now."[24]

It appears, however, that David Mills, Minister of the Interior, was reluctant to endorse Elliott's proposals and, instead, lobbied to have Commissioner Sproat retained as sole Commissioner. In a memorandum to the Privy Council Office on March 7, 1878, he stressed the good work that had been done by the Joint Commission and concluded by recommending that Commissioner Sproat be appointed to allot Indian reserves in British Columbia:

> It is therefore recommended that instead of assigning the task of primarily allotting the Reserves to the Indian Superintendents in their respective Superintendencies, as proposed by that [Federal] Order in Council of the 23rd February 1877, the present Joint Commissioner Mr. Sproat be appointed to discharge that important duty subject to the approval of the Commissioner of Lands and Works of British Columbia and in the event of any difference between the Commissioner and Mr. Sproat the matter to be referred to one of the Judges of the Supreme Court as provided by that Order in Council.[25]

The dominion government accepted Mr. Mills's recommendation, and Mr. Sproat was appointed sole Indian Reserve Commissioner by dominion Order in Council 170, dated March 8, 1878. The Order in Council reads as follows:

> The Committee have had before them the Memorandum hereunto annexed from the Hon. the Minister of the Interior having reference to

---

[24] Provincial Order in Council, February 4, 1878 (ICC Documents, pp. 62-63).

[25] Memorandum of David Mills, Minister of the Interior, March 7, 1878 (ICC Documents, pp. 64-73).

> the proceedings of the Joint Commission of the Goverment of the Dominion and that of British Columbia for the Settlement of the Indian Land difficulties in that Province and to the contemplated reconstruction of that Commission in pursuance of the terms of the Order in Council of the 23rd February 1877, and they submit their concurrence in the recommendations contained in the said Memorandum & advise that they be approved and acted on.[26]

A week later the Minister of the Interior informed the Lieutenant Governor of British Columbia of the dominion government's decision, and requested that British Columbia "carry out order of February seventy seven respecting Indian Comm. substituting Sproat for Indian Supt."[27]

By letter dated March 18, 1878, Commissioner Sproat advised the Superintendent General of Indian Affairs that on the 16th he had been "informed by His Honour the Lieutenant Governor of my appointment to the office proposed to be held by the Indian Superintendents according to the Canadian Order in Council 23rd Feby 1877."[28] Thus, while Mr. Sproat's appointment seems to have been accepted by both levels of government, the federal Order in Council of March 8, 1878, was not immediately reciprocated by a provincial order. This gap left questions regarding the range and scope of Mr. Sproat's authority, an issue that would dominate correspondence among Mr. Sproat and the two levels of government throughout the remainder of 1878 and into 1879.

---

[26] Federal Order in Council, March 8, 1878 (ICC Documents, p. 74).

[27] David Mills, Minister of the Interior, to A.N. Richards, Lieutenant Governor of British Columbia, March 15, 1878 (ICC Exhibit 5).

[28] G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 75-78).

In a second letter to the Superintendent General on March 18, 1878, Mr. Sproat raised the matter of expenses:

> I have today had an interview with the Hon. Mr. Elliott, and, finding that his impression was that under the Order in Council of Feby 23 1877 – which now governs my action – the Provincial Government would be at no expense, I said that I was not at present prepared to assent to that view, though no doubt further discussion might result in an agreement as to procedure under the order.
>
> The approval of the Chief Commissioner of Lands & Works mentioned in said order must, I think, be given on the spot at the time; otherwise the effect will be that I shall be idle in my tent for more than half my time, which means that at each reserve, the Dominion Government will be fined from $500 to $1000, being the expense of the Commissioner while waiting for an answer from Victoria. . . .
>
> Nothing is said in the Order in Council as to who is to pay the Judge of the Supreme Court, who might be called in. It is not likely that such an officer could be got to do the work, and if he did, the cost would be so much that it should be clearly understood who is to pay it. . . .[29]

He also added this thoughts regarding his authority: "I am not without a hope that I can arrange the matter with the Provincial Government in some such way as shall leave the matter virtually in my hands, with an apparent control exercised by the Land Office to satisfy the sentiment of the public in the Province."[30]

On March 25, 1878, the Superintendent General of Indian Affairs informed Mr. Sproat that any actions he might take as Indian Reserve Commissioner were subject

---

[29] G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 79- 84).

[30] G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 79-84).

to approval by the Chief Commissioner of Lands and Works.[31] Specifically, he outlined the following conditions under which Mr. Sproat was to operate:

> . . . subject as provided by that Order [Order in Council of February 23, 1877] to the approval of the Commissioner of Lands & Works of British Columbia and with the right of reference in case of differences between the Commissioner and yourself to one of the Judges of the Supreme Court of that Province. . . .
>
> You will of course understand that you are not to take any action under this letter until notified that the Local Government has approved of the scheme submitted to their consideration by the Government of the Dominion.[32]

In a subsequent effort to clarify Mr. Sproat's authority, the Minister of the Interior telegraphed the Lieutenant Governor of British Columbia in April 1878 and asked if the provincial government would "regard Sproat's allotment of Reserves as final with an apparent control by the Land Office."[33] The Minister went on to explain that if this arrangement was acceptable to the province, Canada would pay "all expenses"; if it was not acceptable, "Commissioner of Lands and Works must accompany Sproat at expense of Province, and in case Referee is required his

---

31 Superintendent General of Indian Affairs to G.M. Sproat, March 25, 1878 (ICC Documents, pp. 85-89).

32 Superintendent General of Indian Affairs to G.M. Sproat, March 25, 1878 (ICC Documents, pp. 85-89).

33 D. Mills to Lieutenant Governor Richards, April 4, 1878 (ICC Documents, pp. 90-91).

expenses must be shared equally."[34] By Order in Council dated April 17, 1878, the province responded to the Minister's offer:

> Government are not prepared to regard settlement of Reserves made by Sproat as final, but will not interfere with his action except in extreme cases. The Dominion Government to pay all expenses of Sproat and half the cost of referee. Answer.[35]

Lieutenant Governor Richards relayed the province's position to Ottawa on April 18, 1878.[36]

The dominion government accepted the province's proposal in a letter dated April 24, 1878.[37] Two days later, the province passed Order in Council 615 relating to the finality of Mr. Sproat's decisions in the Yale district: "all Mr. Sproat's decisions regarding Indian land questions in the Electoral District of Yale be regarded as final, excepting those of which he shall have received notice from either Mr. Teague or Mr. Usher, Government Agents, to lay over."[38]

During the months that followed, Mr. Sproat pressed to have this type of formal authority extended beyond the District of Yale. On April 29, 1878, he wrote to the Superintendent General of Indian Affairs arguing that the Indian Reserve

---

[34] D. Mills to Lieutenant Governor Richards, April 4, 1878 (ICC Documents, pp. 90-91).

[35] Provincial Order in Council, April 17, 1878 (ICC Documents, pp. 92-93).

[36] A.N. Richards, Lieutenant Governor of British Columbia, to R.W. Scott, Secretary of State, April 18, 1878 (ICC Exhibit 2, vol. 1, tab 7).

[37] R.W. Scott to Lieutenant Governor of British Columbia, April 24, 1878 (ICC Documents, p. 95).

[38] Provincial Order in Council, No. 615, April 26, 1878 (ICC Documents, pp. 96-97). Cormorant Island is not in the Yale district.

Commissioner should be independent of provincial control. In commenting on the situation in British Columbia, Mr. Sproat wrote:

> [I]t is admittedly difficult to reconcile the necessities of a Provincial Government dependent upon parliamentary support, and the requirements of a single Commissioner undertaking this land adjustment, but after considering the whole question fully, I made up my mind that the occasion required that my decisions should be final in all cases with the exception of those which the Government Agents in the districts might, on examination, request me to lay over for the opinion of the Provl Government.
>
> I stated this view to the Provincial Government, and after tedious negotiations, thought that they would agree to it, but it appears that without notifying me they sent a telegram to you stating that "they would not interfere with my actions except in extreme cases." I have since been told by Mr. Elliott that your Government have approved this arrangement, but I have not seen your telegram. . . .
>
> After some delay I have today obtained the following copy of a Report of a Committee of the Hon. The Executive Council approved by His Excellency The Lieut. Governor on the 26 Apl 1878 . . . [here follows the contents of Provincial Order in Council 615].
>
> The electoral district of Yale is nearly the whole southern interior of the mainland.
>
> When I go to other districts, my powers must be similarly extended. . . .
>
> The limitation of the Prov Govt interference to "extreme cases" would mean nothing. These matters have to be looked at practically. A letter to the Land office from a settler would, with any Provl Govt, transform any case into an "extreme case."[39]

While Mr. Sproat got on with the business of being Commissioner, officials from the Department of Indian Affairs continued to seek ways of resolving the land

---

[39] G.M. Sproat to Superintendent General of Indian Affairs, April 29, 1878 (ICC Documents, pp. 99-110).

question in British Columbia. On January 20, 1879, I.W. Powell, Indian Superintendent for British Columbia, wrote to the Superintendent General of Indian Affairs about the growth of the fisheries on the coast. Mr. Powell explained that this situation could lead to friction between natives and whites, and he suggested that the land and fishing rights of the coast tribes be "settled and defined as quickly as possible."[40] He noted that if the present Reserve Commissioner continued in the interior, it would be two to three years before he could go to the coast, a delay that he considered to be "unfortunate and inadvisable." Mr. Powell felt it necessary that "some qualified Commissioner . . . undertake the settlement of the Reserves for the Coast Indians during the coming season."[41]

In the meantime, Commissioner Sproat continued to draw criticism from the settler society. On February 19, 1879, he wrote to the Chief Commissioner of Lands and Works in an attempt to answer these charges:

> Having seen in the newspapers a notice of questions to be put to you by Mr. Bennett, from which it might be inferred that the Indian Reserve Commission has assigned for Indian purposes lands held legally by settlers, I beg respectfully to express a wish that, when it may be in your power, you will have the goodness to cause me to be informed of the particulars of any case to which Mr. Bennett refers, so that any mistake may be promptly rectified.
>
> The Reserve Com[r] has no power to do what Mr. Bennett complains of, and no attempt has been made to exercise powers which the Commission does not possess.

---

[40] I.W. Powell to Superintendent General of Indian Affairs, January 20, 1879 (ICC Documents, pp. 114-16).

[41] I.W. Powell to Superintendent General of Indian Affairs, January 20, 1879 (ICC Documents, pp. 114-16).

> Though the total cost of the Commission is paid by the Dominion Government, fully one half of the whole time of the Com[er] is spent examining and protecting not only the rights of white settlers, but the customary advantages and fair expectations of their position as settlers.
>
> When doubtful questions arise, or questions of extreme difficulty, such as are some of those which now have for a long time been before the Provincial Government, it is the practice to refer them to both Governments for an authoritative opinion.[42]

When the province continued to be evasive about the scope of his authority, Commissioner Sproat again wrote to the Chief Commissioner of Lands and Works on March 17, 1879:

> I have the honour to request that, in pursuance of the existing arrangement between the two governments embodied in the Order in Council under which I, lately, have been acting . . . you will cause me to be furnished with the requisite authority from the Provincial Government, so far as they are concerned, for prosecuting the adjustment of the Indian Land question in the districts not yet examined.[43]

While Commissioner Sproat was trying to obtain clarification on the scope of his authority from the province, he received further instructions on April 18, 1879, from the Superintendent General of Indian Affairs "to proceed with the allotment of Reserves on the Coast of British Columbia, leaving the Reserves for the Indians in the northern portion of the Interior until the important question of water for irrigating the

---

[42] G.M. Sproat to the Chief Commissioner of Lands and Works, February 19, 1879 (ICC Documents, pp. 117-18).

[43] G.M. Sproat to the Chief Commissioner of Lands and Works, March 17, 1879 (ICC Documents, pp. 119-20).

same is settled."[44] As a result, Commissioner Sproat wrote to the Chief Commissioner of Lands and Works on May 5, 1879, asking that his authority as Indian Reserve Commissioner be extended to include the coastal areas of British Columbia.[45]

In response to Mr. Sproat's request, the provincial authorities advised him that "the Government is not at present able to say whether the suggestion to take up the West Coast Reserves is good or not."[46] When the Superintendent General repeated his request that Mr. Sproat move to the coast,[47] the Chief Commissioner of Lands and Works corresponded with Commissioner Sproat as follows:

> I have examined the Orders in Council & correspondence relating to the Indian Reserve Commission as at present constituted, and do not find that it is necessary for the Provincial Government to [act] by Order in Council when [desirous] of indicating the [sections] of the Province to which the labours of the Commission might most usefully be directed.
>
> From the representations recently made by well informed persons, who can hardly be classed as alarmists, I think it would be very advisable that the Indian reserves in the Interior, in the vicinity of Clinton and as far North as Soda Creek, should be defined before any work on the Coast is undertaken. The Irrigation question offers no more embarrassment in the Lillooet or Cariboo sections of the Province than was met with in Yale or New Westminster.[48]

---

[44] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to G.M. Sproat, April 18, 1879 (ICC Exhibit 2, vol. 1, tab 11).

[45] G.M. Sproat to the Chief Commissioner of Lands and Works, May 5, 1879 (ICC Documents, pp. 121-22).

[46] W.S. Gore, Surveyor General, to G.M. Sproat, May 7, 1879 (ICC Documents, p. 123).

[47] Letter of May 19, 1879, cited in G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 (ICC Documents, pp. 137-38).

[48] G.A. Walkem to G.M. Sproat, May 28, 1879 (ICC Documents, p. 124).

Commissioner Sproat immediately wrote to the Superintendent General of Indian Affairs, apprising him of his correspondence with the province. With respect to the matter of his authority he noted:

> You will observe that the Com'. of Lands does not consider that any Provincial Order in Council is required to empower me. I presume he considers that as single Commissioner, succeeding by agreement to the three Commissioners, I have the powers which they had by the original agreement between the two govts contained in the proposals sent by the Secy of State to the Lt Governor 15 Dec 1875 . . .[49]

On May 29, 1879, Mr. Sproat sent a confirming letter to the Chief Commissioner of Lands and Works:

> I have received your letter . . . following my letters of 5 May and 17 March last, and I note that my authority, as far as the Prov. Gov. is concerned, is sufficient without the Order in Council which I had supposed might have been necessary . . .[50]

Two months later, Mr. Sproat reiterated his understanding of the province's position in a letter to the Deputy Superintendent General of Indian Affairs:

> Mr. Walkem's government, on my asking for full powers to enable me to work effectively in other districts than Yale stated . . . that my powers were ample . . . and no further Orders in Council were needed – that is to say I had simply succeeded the three Commissioners. My decisions are made on the spot unless I choose to hold them over and they are not

---

[49] G.M. Sproat to Superintendent General of Indian Affairs, May 28, 1879 (ICC Documents, pp. 125-28).

[50] G.M. Sproat to the Chief Commissioner of Lands and Works, May 29, 1879 (ICC Documents, p. 129).

> subject to the approval of the Chief Commissioner of Lands, and as a consequence there is no referee.[51]

Believing that, in the absence of specific orders stating otherwise, the province intended him to continue under the guidelines of the former Joint Reserve Commission, Mr. Sproat planned to start working outside of the interior. However, on August 7, 1879, the Chief Commissioner of Lands and Works, wary of the imminence of rebellion in the interior, protested Mr. Sproat's upcoming visit to the province's coastal areas:

> I am informed that as Indian Commissioner you are about to visit some of the tribes of Indians living on the Coast. I protest against such a visit as I have every reason to believe that it would at present be most impolitic, and do more harm than good, and on behalf of the Government I must further object to your leaving the Indian land question as it affects the Interior in its present unsettled condition.[52]

In his answer to the Chief Commissioner, Mr. Sproat explained that he thought that the Superintendent General's instructions to proceed to the coast were reasonable and not "most impolitic," and that in the past six months he had had "as urgent messages and reminders sent to [him] from Indians on the Coast as from Indians in the

---

[51] G.M. Sproat to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 29, 1879 (ICC Documents, pp. 130-32).

[52] G.A. Walkem, Chief Commissioner of Lands and Works, to G.M. Sproat, August 7, 1879 (ICC Documents, p. 133).

Interior."[53] He also pointed out that the provincial government still had not settled the water question in the interior.[54]

Commissioner Sproat was later to confirm for himself the urgency of the "messages and reminders" sent from the coastal Indians when he began the task of allotting reserves on the coast. On November 11, 1879, he wrote to Dr. Powell, Indian Superintendent, from the schooner *Thornton* harboured in Alert Bay. In that letter, he stated:

> I now know the condition and requirements of the Indians from the south of Vancouver Island to its extreme north, including the Mainland Coast up to Cape Caution, and my opinion is the same as that expressed by Mr. VanKoughnet in his official report last year, to the effect that in the Coast Superintendency, as in the Fraser Superintendency, the arrangements are not suitable to the circumstances.

---

[53] G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 (ICC Documents, pp. 134-39).

[54] Although the Indian Reserve Commission was created specifically to deal with land, Sproat, as Reserve Commissioner, recognized that in many areas of the province land rights and water rights were inseparable. This was particularly true in the interior, which would best be defined as semi-arid. It was also in this area that Indians and Europeans were in direct competition for access to water, as both needed a reliable water supply for their stock: see Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 195. In an effort to address this problem, Sproat often took it upon himself to allocate water rights as part of his Minutes of Decision on reserve establishment. This decision did not sit well with the provincial authorities, who felt that Sproat was overstepping the bounds of his responsibilities. When it became clear that the province was reluctant to recognize his allocations, Sproat sought to involve the dominion government. He informed Indian Affairs that to proceed with reserve allotments in the interior without making provision for Indian access to water for irrigation would lead to further embarrassment and expense for the dominion government. It appears that Sproat's decision to visit the coast and Vancouver Island was arrived at through his frustration over the province's refusal to take steps to resolve the water issue. (Sproat's attitude to the water rights question is touched upon in the following documents: G.M. Sproat to Superintendent General of Indian Affairs, May 28, 1879 [ICC Documents, pp. 125-28], G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 [ICC Documents, pp. 134-39].)

> This statement may be made without unkind criticism, but it is a most grave matter that the condition of so many Indians within easy reach of Victoria and in the heart of the Coast Superintendency should be in the unsatisfactory condition in which they are, and which is worse than any group of Indians which came under my examination in the Interior of the Province. . . .
>
> I have not been in any part of the Province where, under all the circumstances, an adjustment of land matters was more necessary . . .[55]

A short while after making these observations, Commissioner Sproat submitted his resignation as Indian Reserve Commissioner on March 3, 1880.[56] He was succeeded in the post by Peter O'Reilly, a Provincial County Court Judge and Stipendiary Magistrate, who was appointed Indian Reserve Commissioner by authority of dominion Order in Council 1334, dated July 19, 1880.[57]

Cormorant Island and the Huson Lease

On his trip along the coast, Commissioner Sproat met with a variety of aboriginal nations, including the "Nimkish" of Cormorant Island. Several years before Mr. Sproat arrived at Cormorant Island, a group of white settlers, A.W. Huson, E.T. Huson, U. Nelson, and E.A. Wadhams, had obtained a renewable 21-year lease covering the whole of the island. More particularly, the lease related to:

> All that piece or parcel of land and situate in Broughton Straits on the east coast of Vancouver Island and being known on the official Map as

---

55 G.M. Sproat to Dr. Powell, Indian Superintendent, November 11, 1879 (ICC Exhibit 2, vol. 1, tab 35).

56 G.M. Sproat to Superintendent General of Indian Affairs, March 3, 1880 (ICC Exhibit 2, vol. 1, tab 45).

57 Federal Order in Council 1334, July 19, 1880 (ICC Documents, pp. 179-85).

> Cormorant Island and containing six hundred acres more or less as the same is more particularly described on the plan hereunto annexed . . .[58]

Although the lease described the area involved as 600 acres (whereas Cormorant Island is in actual fact closer to 1500 or 1600 acres), the annexed plan included the whole island.

The lease, dated August 3, 1870, was signed by B.W. Pearse, Assistant Surveyor General, acting on behalf of the government of British Columbia in the temporary absence of the Chief Commissioner of Lands and Works and Surveyor General, Joseph Trutch. It contained a number of terms, including the following:

- Rent of $40 per annum was to be paid semi-annually on June 30 and December 31 each year.
- The lessees could not assign the lease without the consent in writing of the Chief Commissioner of Lands and Works.
- The government retained the right to resume possession of any portion of the leased lands with two months' notice in writing.[59]

There is evidence that the 'Namgis First Nation had an established village on Cormorant Island before the lease was granted. In 1870 the Royal Navy was active on the coast and, in a report of his activities, Commander Mist of the HMS *Sparrowhawk* noted that on March 22, 1870, he went with interpreters "to the Nimpkish winter village at Alert Bay."[60]

---

[58] Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

[59] Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

[60] Commander H.N. Mist to Captain Algernon Lyons, April 1, 1870 (ICC Documents, pp. 5-15).

When Commissioner Sproat visited the area in 1879 he took note of the Huson lease at Cormorant Island and wrote to the Chief Commissioner of Lands and Works as follows:

> I find much anxiety respecting their lands on the part of all the Indians I have visited – the Klah-hoose, Sliammon, Homalthko, Euclataw and the various Kwawkewlth tribes.
>
> Pending the results of the investigation which I am now actively making, I respectfully mention that it would appear to be very undesirable that lands not ascertained to be Indians Lands, or required as such, should be alienated by the Provincial Government in this quarter, particularly at Nimkish, Salmon River, Beaver Cove, or around Fort Rupert and at Campbell River . . .
>
> Mr. Wes Huson has applied for land at Nimkish, but it is essential that no sales should be made there until the Indians reasonable requirements are ascertained.
>
> From 1,200 to 1500 Indians look to Nimkish mainly for their support.[61]

He also wrote to the Superintendent General of Indian Affairs, informing him that:

> The whole of Cormorant Island, including so far as I can ascertain, a settlement of the Nimkish Indians, where they still reside, has been released by the Provincial Government to a Mr. Huson for a long term of years.[62]

---

[61] G.M. Sproat to the Chief Commissioner of Lands and Works, October 28, 1879 (ICC Documents, pp. 152-53).

[62] G.M. Sproat to Superintendent General of Indian Affairs, November 11, 1879 (ICC Documents, pp. 154-56).

In the wake of these observations, Commissioner Sproat issued a Minute of Decision on January 2, 1880, allotting all of Cormorant Island, with the exception of 320 acres, to the Nimkeesh Indians. The Minute of Decision reads as follows:

> A Reserve consisting of the whole of the Island described in the Admiralty Chart as Cormorant Island, Broughton Strait, opposite the mouth of Nimkeesh River with the exception of the following portions of land, also shown on sketch; namely 160 acres of land on a portion of which Mr. A. Wesly Huson has his improvements, said 160 acres not to have more frontage on Alert Bay than from the north boundary of his small potatoe [sic] patch (lying on the north side of a small stream between the stream and the Indian houses) southerly along shore to within two chains of the most northerly Indian grave and excepting also 160 acres of land applied for to the Government by Mr. Hall, which last named portion is not to have more than 10 chains frontage on Alert Bay, running westerly from the spot – known as the "Cedars" – the Indians to have prior right to water for household and necessary purposes from all sources of water supply on the Island.[63]

The Mr. Hall mentioned in the Minute of Decision was Reverend Hall – a missionary who wished to establish a mission on Cormorant Island.

On January 4, 1881, a year after Commissioner Sproat had allotted the island as a reserve, A.W. Huson wrote to the Chief Commissioner of Lands and Works giving his approval for Reverend Hall's application for "a portion of land North West of the Indian Village at Alert Bay."[64] Reverend Hall subsequently made formal application to pre-empt 160 acres of Cormorant Island on March 10, 1881. Included

---

[63] G.M. Sproat, Indian Reserve Commissioner, Minute of Decision, January 2, 1880 (ICC Documents, pp. 176-78).

[64] A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, January 4, 1881 (ICC Documents, p. 186).

in Reverend Hall's application was a sketch map indicating that the remainder of the island, other than his 160-acre application and Mr. Huson's 160 acres, was "Indian Reserve."[65]

A.W. Huson again raised the matter of his lease on Cormorant Island in November 1881 when he wrote to the Chief Commissioner of Lands and Works to inform him that he had purchased the interest of E.J. Huson, U. Nelson, and E.A. Wadhams in the lease. Expressing a desire to build a fish cannery and to secure an unquestionable title to the land, Mr. Huson asked for either a Crown grant of 160 acres or the cancellation of Commissioner Sproat's reserve allotment. He complained that owing to Mr. Sproat's actions, "[t]he Indians are consequently now in possession of the land for which I am paying a yearly rental of $40."[66]

It became clear, however, that the province had no intention of granting Mr. Huson's request for a Crown grant, and, instead, it turned its attention to cancelling Commissioner Sproat's allotment. On January 28, 1882, G.A. Walkem, the Chief Commissioner of Lands and Works, informed I.W. Powell, Indian Superintendent for British Columbia, that the province would not recognize the reserve set apart by Mr. Sproat on Cormorant Island for two reasons:

> 1stly. Owing to his [Commissioner Sproat's] having been informed by letter of the 7th August 1879 from me, that the local Government would not accept any Indian reservations made by him on the North West Coast, and would therefore have to protest again his then intended purpose of proceeding up the Coast at a useless cost.

---

[65] A.J. Hall, Application to Record, March 10, 1881, British Columbia, Department of Lands (ICC Documents, pp. 187-89).

[66] A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, November 24, 1881 (ICC Documents, pp. 191-96).

> 2ndly. As the whole Island has been leased ever since August 3rd 1870 (prior to Confederation) by the Government to Messrs. Huson and others, at a yearly rental which has been regularly paid up to the present time.
>
> Mr. Sproat also undertook to lay off a plot of 160 acres out of this leasehold for the Revd. Mr. Hall for Church Missionary purposes. This extraordinary proceeding is only one of several instances of his reckless indifference to the instructions given to him as Indian Commissioner.[67]

Mr. Powell's reaction to the province's decision was to write to the Superintendent General of Indian Affairs, giving his understanding of Mr. Sproat's actions: "Mr. Sproat informed me at the time that the reserve he made at Cormorant Island was subject to the conditions of the lease referred to by Mr. Walkem, and was not intended to interfere in any way with the same until its time limit had expired."[68] He went on to describe the circumstances of the island:

> It is also desirable to inform you that a large tribe of Indians have a village on Cormorant Island upon the land leased to Mr. Huson.

---

[67] G.A. Walkem, Chief Commissioner of Lands and Works, to Lieutenant Colonel Powell, Indian Superintendent, January 28, 1882 (ICC Documents, pp. 197-98). It should be noted that the Chief Commissioner's allegation that rental payments were regularly made by the lessees is a point of contention in the historical documents. On October 17, 1873, the Chief Commissioner of Lands and Works for British Columbia wrote to A.W. Huson requesting $100 in lease payments owing from January 1, 1871, to June 30, 1873: Chief Commissioner to A.W. Huson, October 17, 1873 (ICC Documents, p. 41). There exists no further record of the province requesting payment for arrears due. Mr. Huson, himself, in a letter dated November 24, 1881, alleged that he had "regularly paid the yearly rental": A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, November 24, 1881 (ICC Documents, pp. 191-96). However, in 1884 Reverend Hall claimed that while the lease money was paid, "till Mr. Gill Sproat's action in 1880 . . . [Huson] never paid a cent after that date": A.J. Hall to W. Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

[68] I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201).

> Cormorant Island is just opposite the mouth of the Nimpkish River, which although small, has always been a most important fishing stream for the Indians. . . . The Nimpkish river is however a small stream at best, but as a large number of Indians derive their supply of food from there, it is all the more necessary to protect not only their fishing rights, but to make suitable reservations for them which in the future may be free from encroachments.
>
> In view of the prospective establishment of other Canneries, the statement communicated to Mr. Sproat in August 1879 and now referred to in the enclosed letter i.e. that the reserves made by Mr. Sproat on the North West Coast would not be recognized by the Provincial Government should have, in my opinion, immediate consideration, and the necessary steps taken to provide a satisfactory solution to the apparent difficulty.[69]

While Mr. Powell waited for a reply from the Superintendent General, Mr. Nelson and Mr. Wadhams wrote to the Chief Commissioner of Lands and Works on February 6, 1882, notifying him that they had assigned and transferred their interests in the Cormorant Island lease to A.W. Huson.[70]

In response to Mr. Powell's letter, the Deputy Superintendent General instructed Mr. Powell to obtain the opinion of J.W. Trutch, by this time John A. Macdonald's "Confidential Agent on Indian Affairs and Railways Matters."[71] By memorandum dated May 5, 1882, Mr. Trutch dealt with the two objections raised by the Chief Commissioner of Lands and Works in his letter of January 28, 1882. With

---

[69] I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201).

[70] Uriah Nelson and E.A. Wadhams to the Chief Commissioner of Lands and Works, February 6, 1882 (ICC Documents, p. 202).

[71] Deputy Superintendent General to I.W. Powell, Indian Superintendent, February 23, 1882 (ICC Documents, pp. 203-04).

regard to the first objection (that Mr. Sproat had been informed that the province would not accept any reservations on the Northwest Coast), Mr. Trutch argued that the objection was of questionable validity because the Chief Commissioner's letter of August 7, 1879, to Mr. Sproat conveyed "only an expression of opinion on behalf of the Provincial Government that it would be impolitic for Mr. Sproat . . . to visit the Indians on the North West Coast."[72] However, Mr. Trutch did find the Chief Commissioner's second objection (that the whole island was leased) "clearly valid and insurmountable":

> I cannot understand upon what grounds Mr. Sproat could have assumed discretion to appropriate any portion of this Island as an Indian Reservation, if he was aware of the fact that the whole of the Island had been long previously placed under lease right, which was then still existing . . .
>
> All the conditions and agreements have been observed, and performed by the Lessees, and there is no question that this Leaseright is now in full force. . . .
>
> Power is indeed reserved to the Government of British Columbia in the Indenture of Lease to resume possession of the whole or any portion of the premises thereby demised, upon giving two (2) months notice to the Lessees. But the exercise of this right is entirely in the discretion of that Government, and was certainly not intended to be, and doubtless will not be taken advantage of except on grounds of the requirements of the public interests, and upon payment of just compensation to the Lessee's; and it is evident from the letter of the Chief Commissioner of Lands and Works now under consideration that such requirements are not held by the Government of British Columbia

---

[72] Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

> to exist, in connection with Mr. Sproat's unauthorized appropriation of Cormorant Island as an Indian Reservation.[73]

In January 1884 the lease on Cormorant Island was transferred from A.W. Huson to T. Earle and S. Spencer, two men who wished to operate a cannery on the island.[74] The transfer of the lease marked the beginning of the next phase in the controversy over the Sproat allotment. On February 14, 1884, George Blenkinsop, the Indian Agent for the Kwawkewlth Agency, informed Indian Superintendent Powell that Mr. Spencer had renewed the lease for Cormorant Island. With regard to the Sproat allotment, Mr. Blenkinsop observed:

> There is . . . abundant evidence to prove, both by living testimony and by the remains and relics of by-gone days, that Alert Bay was, formerly, the home of a large Indian population. In fact, they abandoned the place only in 1837-1838, on the first appearance of smallpox, when great numbers of them perished. . . .
>
> The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects.
>
> The present occupants are surely bound by this action of Mr. Huson.[75]

---

[73] Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

[74] The date is taken from A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

[75] George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

Mr. Powell, in turn, wrote to Commissioner O'Reilly to apprise him of the situation on Cormorant Island. Mr. Powell offered the opinion that:

> In view of the correspondence between the two Governments in regard to the former lease held by Mr. Huson, and the fact that a large Indian Village existed on the land, I am at a loss to understand any reason for regranting the lease to another applicant.[76]

He concluded by suggesting that, if the statement made to Indian Agent Blenkinsop (that the lease had been granted to Spencer) was correct, "the matter might be referred to the Right Hon Superintendent General for settlement with the Hon Chief Commissioner of Lands and Works while the latter gentleman is in Ottawa."[77]

Indian Superintendent Powell also wrote to the Superintendent General of Indian Affairs, enclosing Agent Blenkinsop's letter and pointing out that there was a clause in the original lease that permitted the Chief Commissioner of Lands and Works to terminate the lease by giving two months' notice or to amend it by taking any portion of the leased land that might be desirable. He warned:

> The right which Mr. Spencer assumes by virtue of the lease of controlling a large Indian Village or of inviting other tribes to settle on land allotted to and claimed by Nimpkish Indians would soon occasion serious difficulties.
>
> Alert Bay is a central location more convenient than Fort Rupert for the headquarters of the agent of the Department and it is not desirable that Mr. Spencer should have the leasehold of more land on the Island than is absolutely essential for Cannery purposes, and, in any event, all

---

[76] I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

[77] I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

> doubt should be removed as to the right he claims to exercise over the Nimpkish Village and reserve.
>
> Upon inquiry at the land office, it would appear that Mr. Huson has transferred his right to the lease to Mr. Spencer but so far as the Surveyor General is aware no official sanction has as yet been given by Mr. Smithe to the conveyance.[78]

Commissioner O'Reilly reported to the Superintendent General that any action would be inopportune until the province consented "to re enter, and take possession of such portions of the Island as are necessary for the Indians."[79] He stated that the province had the power to take such steps under the terms of the lease, and added further that "a portion of the land under consideration is the site of a large Indian village, and as such should never have been included in the lease granted to Mr. Huson."[80]

In March 1884 Reverend Hall, apparently learning that the Huson lease had been transferred to Mr. Spencer, wrote to the Chief Commissioner of Lands and Works expressing concern over the security of his pre-emption on the island, since Mr. Spencer had informed him that he might now be a trespasser. As with Indian Agent Blenkinsop before him, Reverend Hall argued that the whole situation was the result of Mr. Huson's actions. Reverend Hall asserted that it was Mr. Huson who had

---

[78] I.W. Powell, Indian Superintendent, to Superintendent of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

[79] P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

[80] P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

proposed cancelling his (Huson's) lease in exchange for a free grant of 160 acres, and then making the balance an Indian reserve.[81]

The province, however, maintained that the difficulty at Cormorant Island was "entirely the creation of the Indian Reserve Commissioner who without any right, legal or otherwise, to do so assumed authority to place under reservation land which was at the time of action under lease to Messrs. Huson and others."[82] Accordingly, the Chief Commissioner of Lands and Works, William Smithe, resisted any suggestion that the province should terminate the lease.

Early in June 1884, Commissioner O'Reilly suggested that he go to Cormorant Island and ascertain what quantity of land was necessary for the Indians.[83] Chief Commissioner Smithe accepted Mr. O'Reilly's offer, stating that he could "see no reason why, if properly undertaken, the requirements of the Indians and the interest of the lessees may not be severally conserved."[84] After receiving the approval of the Chief Commissioner, Mr. O'Reilly approached the Deputy Superintendent General, who also endorsed his visit.[85]

---

81 A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

82 William Smithe, Chief Commissioner of Lands and Works, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 12, 1884 (ICC Documents, pp. 232-39).

83 P. O'Reilly to the Chief Commissioner of Lands and Works, June 4, 1884 (ICC Documents, pp. 240-41).

84 William Smithe, Chief Commissioner of Lands and Works, to P. O'Reilly, June 13, 1884 (ICC Documents, p. 242).

85 P. O'Reilly to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, October 4, 1884 (ICC Documents, p. 243); L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to P. O'Reilly, October 20, 1884 (ICC Documents, pp. 245-46).

Commissioner O'Reilly travelled to Cormorant Island in the fall of 1884, and on October 20, 1884, he set out two reserves on Cormorant Island for the Nimkeesh Indians: a "Reserve of fifty (50) acres, situated on Alert Bay, Cormorant Island," and a "Burial ground, containing two (2) acres."[86] He then submitted the Minutes of Decision for the reserves to the Chief Commissioner of Lands and Works and the Deputy Superintendent General of Indian Affairs for their approval.[87] In his letter to the Chief Commissioner, Mr. O'Reilly indicated that he had conferred with Mr. Spencer, the lessee, before setting out the reserves, and that Mr. Spencer had given his support for the proposed reserves.[88] The Chief Commissioner gave his approval on December 2, 1884: "The reserve proposed seems to me to be reasonable and with Mr. Spencer on behalf of the lessees of the Island consenting as you report, I am very glad to approve."[89]

Commissioner O'Reilly visited the Nimkeesh Indians again in 1886, at which time he allotted an additional three reserves. By Minutes of Decision dated September 21, 1886, he allotted:

---

[86] P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, October 20, 1884 (ICC Documents, pp. 247-55).

[87] P. O'Reilly to the Chief Commissioner of Lands and Works, November 29, 1884 (ICC Documents, p. 256). It is not clear when Commissioner O'Reilly submitted the Minutes of Decision to the Deputy Superintendent General of Indian Affairs. The latter acknowledged receipt of the Minutes on February 26, 1885: L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to P. O'Reilly, February 26, 1885 (ICC Documents, p. 258).

[88] P. O'Reilly to the Chief Commissioner of Lands and Works, November 29, 1884 (ICC Documents, p. 256).

[89] William Smithe, Chief Commissioner of Lands and Works, to P. O'Reilly, December 2, 1884 (ICC Documents, p. 257).

IR 3: "Ches-la-kee, a reserve of three hundred and thirty five (335) acres, situated at the mouth of Nimkeesh river, Broughton Strait, and south of and adjoining Section six (6) Rupert district."

IR 4: "Arse-ce-wy-ee, a reserve of forty two (42) acres, situated on the left bank of the Nimkeesh river, about two and a half miles from its mouth."

IR 5: "O-tsaw-las, a reserve of fifty (50) acres, situated on the right bank of Nimkeesh river, half a mile from the outlet of Karwutseu Lake."[90]

These three reserves were approved by the Chief Commissioner of Lands and Works on July 27, 1888.[91]

There are discrepancies between the acreage figures set out in Commissioner O'Reilly's Minutes of Decision and the figures appearing in subsequent documentation. The 1913 Schedule of Indian Reserves in the Dominion lists the following acreage figures for the five reserves:

1 Alert Bay . . . 46.25 (acres)
2 Burial ground . . . 1.87
3 Ches-la-kee . . . 302.87
4 Ar-ce-wy-ee . . . 41.30
5 O-tsaw-las . . . 53.25[92]

These figures are consistent with those confirmed in the Minutes of Decision of the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-

---

90 P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 21, 1886 (ICC Documents, pp. 250-55).

91 Plan of the Nimkeesh Indian Reserves (ICC Documents, p. 259).

92 Schedule of Indian Reserves in the Dominion, 1913 (ICC Documents, p. 267).

McBride Commission) on August 14, 1914,[93] and with the amount of land transferred to the federal government by provincial Order in Council 1036 on July 29, 1938.[94] Thus, the 'Namgis First Nation was ultimately allotted 46.25 acres for Alert Bay (IR 1), and 1.87 acres for the burial ground (IR 2), for a total of 48.12 acres on Cormorant Island.

Oral Testimony: Occupation and Use of Cormorant Island

During the community session at Alert Bay, we heard the evidence of several elders and community members that the 'Namgis people historically used (and, to a certain extent, still use) the whole of Cormorant Island. For example, George Cook described in some detail the food- and wood-gathering activities that took place throughout the island:

> [W]e also had our food supply on this island [Cormorant Island], we used to get wood on the southern portion of the island, also picked seaweed there for our livelihood, and Chinese slippers. And all this was all – this was on the southern portion of the island, and also on the northern portion of the island we had clam beds there also.
>
> . . .
>
> And I think the cemetery on the island, it gives a good indication that the whole island belonged to Nimpkish, and until the island was divided up and the B.C. Packers came in and came in the middle of the island and separated the reserve from the cemetery so that there was a block put in there, in reality there was a trail from the reserve, as it's called in the English language. So to our people, the clear indication is that the whole island still belongs to Nimpkish. Also that on the top of

---

[93] Royal Commission on Indian Affairs for the Province of British Columbia, Minutes of Decision, August 14, 1914 (ICC Documents, p. 293).

[94] Schedule of Reserve Allotment in Kwawkewlth Agency attached to Provincial Order in Council 1036, July 29, 1938 (ICC Documents, p. 295).

> the island that there was – our people used to go and also pick salalberries, huckleberries, all these, and they used to dry them and put them away for the winter. So there's a clear indication that the whole island was made use by our ancestors.
>
> And even today we still go at the top of the island and I think – where you came in yesterday, in the airport, there's still huckleberries there and things like that – still there, which we still use for our supply.
>
> . . .
>
> This on the chart is Gordon Bluff here, and this is what I was talking about where we picked our seaweed, and they still do that today all along here, and also that all along in here, there's a small clam bed here. And on top of the island here where you landed yesterday, this is where we still pick berries, salmonberries and huckleberries and salalberries, all these are all foods up here . . .
>
> . . .
>
> Also on the Gordon Bluff on Cormorant Island that the sea eggs here also that we used for food.[95]
>
> – George Cook

In addition to food- and wood-gathering, the elders recalled that a number of areas were used as burial sites.[96] George Cook gave us the following information:

> MS. GROS-LOUIS AHENAKEW: Do you remember any burial sites on this island or any other island in question?
>
> GEORGE COOK: Yes, there's a cemetery on the island, and also that – it was passed down to me there's also a custom that they buried in large trees that we had on the island. And they're – just up until a few years ago that these boxes of our dead were – how shall I put that, now? – the

---

[95] ICC Transcript, April 21, 1995, pp. 2-6 (George Cook). See also the testimony of Ethel Alfred (ICC Transcript, April 20, 1995, pp. 16-18, 27) and Peggy Svanvik (ICC Transcript, April 20, 1995, p. 33).

[96] See the testimony of Mary Hanuse (ICC Transcript, April 20, 1995, p. 10) and Ethel Alfred (ICC Transcript, April 20, 1995, p. 25).

> boxes fell down, but they were scattered all across the island. They had to pick certain trees and they had to be sturdy trees and have a lot of branches. So they to my knowledge didn't pick specific spots. It had to go by the tree.
>
> And yes, we also have a cemetery here, and I think there also has been a lot of harm done to our ancestors that have been buried there. The museum is built on some of our past leaders and great people, and today that's still very hard to take for our people that they know. They even have the names of the people at – where the museum is today, the museum was built right on top of it. The museum is down on the southern end of the island.[97]
>
> – George Cook

Bill Cranmer[98] provided similar evidence:

> I understand that there were different trees selected right throughout Cormorant Island for burial sites.[99]
>
> – Bill Cranmer

Many of the witnesses at the community session spoke of the hardship faced by the 'Namgis people after the reserves were allocated on Cormorant Island. They explained to the Commission that they were severely restricted by the amount of land provided for their use:

> It's such a small place that we never had a place to play. We used to just play in front of the long houses.
>
> . . .

---

97 ICC Transcript, April 21, 1995, p. 10 (George Cook).

98 At the time of the community session, Bill Cranmer was the Director of the U'mista Cultural Centre, and he is currently the Chairman of the Board of the Centre. He was elected Chief of the 'Namgis First Nation on May 10, 1995.

99 ICC Transcript, April 21, 1995, p. 15 (Bill Cranmer).

> So there's a lot of things that from now on, from my generation down, they're having a hardship for the recreation and stuff, like for the kids, because this island is too small. They should have given them more space, you know, to build things and stuff.[100]
>
> – Mary Hanuse

> So it was – we didn't have no place to play.
>
> . . .
>
> So it was pretty hard growing up. We had no places to go to, you know, after they must have divided – the government must have divided the island and said that we didn't need any big place to be, you know.[101]
>
> – Ethel Alfred

> But the idea that the whole island belonged to them, and it was only when a decision came down that they allotted – was it 50 acres or whatever it was to the Nimpkish to live there, that there was – I think it was also mentioned yesterday how crowded that the Nimpkish were in that small village, and they don't think at that time when the 50 acres was allotted that it's always customary that all our homes were all along the waterfront. But when you give 50 acres to people – to the Nimpkish, I should say – and the limited shoreline that was left to them, the hardships that our people went through and our children also at that time, there was no room for them to play or anything of that sort.[102]
>
> – George Cook

Several of the elders also told us about the inadequacies of their water supply:

> We did have a hard time, because I knew I had to pack water when it's kind of a dry season, because we never had water until later on, in the

---

100 ICC Transcript, April 20, 1995, pp. 12-13 (Mary Hanuse).

101 ICC Transcript, April 20, 1995, pp. 16 and 19 (Ethel Alfred).

102 ICC Transcript, April 21, 1995, p. 8 (George Cook).

'50s, I guess, when they started finding the well for this reserve anyway.[103]

– Mary Hanuse

And it used to be very hard for us. . . . We had no water, running water. We had a well, and I used to empty that well we had. It used to kind of dry up, and I'd go inside it and scrub it because it was used for every day. Boys had to pack water every day . . .[104]

– Ethel Alfred

I was born in time to be packing water too. We didn't have running water at home. There was a well further up from where Ethel lived where we used to go and pack water, and there was just a trail going up there that we used to pack water when we were children.[105]

– Peggy Svanvik

[N]o consideration was taken that their water supply was only surface water and the water that they were drinking, what I was told was that there was coloured water. It wasn't clear water, which would mean that it either ran through cedar that's laying on the ground or rain water, and this was their water supply at that time.

. . .

[W]hen the B.C. Packers moved in and they built a dam and further cut off the water supply to the village, and also that the effect of a cannery, how it affected our people, was all the guts and heads, whatever, that these all drifted along the beach.[106]

– George Cook

---

103 ICC Transcript, April 20, 1995, p. 13 (Mary Hanuse).

104 ICC Transcript, April 20, 1995, pp. 15 (Ethel Alfred).

105 ICC Transcript, April 20, 1995, p. 34 (Peggy Svanvik).

106 ICC Transcript, April 21, 1995, pp. 8 and 36-7 (George Cook).

> [M]y mother has also said that it appears that our people were just slowly pushed away from the traditional water supply that they used to have, which is the swamp, as they call it, that had a creek running down – it's now called Gater Gardens – and that supply was lost to our people.
>
> . . .
>
> . . . our people were slowly pushed away from the creek that used to be the major water supply on the island, which was taken over by B.C. Packers for their cannery.[107]
>
> – Bill Cranmer

Thus, we heard evidence that, historically, the whole of Cormorant Island was used by the 'Namgis people for such purposes as food- and wood-gathering and for burials. Despite this use of the entire island, only a small portion of the island was ultimately confirmed as reserves for the 'Namgis people. As a result, they were left with a severe shortage of space and with an inadequate supply of water.

---

[107] ICC Transcript, April 21, 1995, pp. 15 and 18 (Bill Cranmer).

PART IV

ISSUES

The central question this Commission has been asked to inquire into and report on is whether Canada properly rejected the Cormorant Island claim of the 'Namgis First Nation.[108] In other words, does Canada owe an outstanding lawful obligation, as defined in *Outstanding Business*, to the 'Namgis First Nation? This overarching question can be broken down into the following subsidiary issues:

1 Did Canada have a mandatory obligation pursuant to the Order in Council (and related documentation) appointing Mr. Sproat as Indian Reserve Commissioner to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

2 Did Canada have a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

3 In the alternative, did Canada have an obligation pursuant to Article 13 of the *Terms of Union, 1871*, to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to the Secretary of State for the Colonies?

4 If the answer to Issue 2 or 3 is yes, did Canada fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion?

5 If the rejection of Commissioner Sproat's allotment of Cormorant Island had been referred to a Judge of the British Columbia Supreme Court, would Commissioner Sproat's allotment have been upheld?

---

[108] We note that there was no agreement between the parties as to the specific issues to be addressed by the Commission in this inquiry.

6 Was Canada negligent in not referring the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court or to the Secretary of State for the Colonies?

7 Does this claim fall within the scope of the Specific Claims Policy?

PART V

ANALYSIS

ISSUE 1

Did Canada have a mandatory obligation pursuant to the Order in Council (and related documentation) appointing Mr. Sproat as Indian Reserve Commissioner to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

The Orders in Council

As discussed in Part III above, the Order in Council by which Mr. Sproat was appointed sole Indian Reserve Commissioner was dominion Order in Council 170. It was passed by the dominion government on March 8, 1878, and essentially adopted the recommendations contained in the annexed memorandum of David Mills, Minister of the Interior, dated March 7, 1878. For ease of reference, we repeat the relevant portion of Mr. Mills's memorandum (and, by extension, Order in Council 170) here:

> It is therefore recommended that instead of assigning the task of primarily allotting the Reserves to the Indian Superintendents in their respective Superintendencies, as proposed by that Order in Council of the 23rd February 1877, the present Joint Commissioner Mr. Sproat be appointed to discharge that important duty subject to the approval of the Commissioner of Lands and Works of British Columbia and in the event of any difference between the Commissioner and Mr. Sproat the matter *to be referred* to one of the Judges of the Supreme Court as provided by that Order in Council.[109]

---

[109] Memorandum of David Mills, Minister of the Interior, March 7, 1878 (ICC Documents, pp. 64-73). Emphasis added.

The "Order in Council of the 23rd February 1877" mentioned in Mr. Mills's memorandum outlines a similar procedure for resolving disputes between the Commissioner of Lands and Works and Mr. Sproat but uses slightly different language:

> . . . after the dissolution of the [Joint] Commission the Superintendents of Indian Affairs in their respective localities should apportion as soon as practicable all the lands remaining unallotted or unreserved by the present Commission, such apportionment to be subject to the approval of the Chief Commissioner of Lands and Works of British Columbia acting on behalf of the Local Government, and in the event of any difference between the Superintendents and the Chief Commissioner as to the extent or locality of the lands to be allotted, the matter ***might be referred*** to one of the Judges of the Supreme Court of that Province whose decision should be final.[110]

The impetus for the Order in Council of February 23, 1877, was a letter sent to the Minister of the Interior from the Provincial Secretary, A.C. Elliott. That letter, embodied in a provincial Order in Council dated January 30, 1877, provides a third variation in language:

> After the dissolution of the present Indian Commission, the Superintendents of Indian Affairs, in their respective localities, should apportion as soon as possible, all the lands remaining unallotted or unreserved by the present Commission.
>
> The lands thus apportioned should however be subject to the approval of the Chief Commissioner of Lands and Works, acting on behalf of the Provincial Government before being finally Gazetted as Indian Reserves. In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendents of

---

[110] Federal Order in Council, February 23, 1877 (ICC Documents, pp. 59-61). Emphasis added.

> Indian Affairs as to size or extent of lands to be allotted to any Indian Tribe, the matter *could be referred* to one of the Judges of the Supreme Court, whose decision should be final.[111]

Thus, we have three Orders in Council – one saying any difference between the Commissioner of Lands and Works and Mr. Sproat is "to be referred" to one of the Judges of the Supreme Court (dominion Order in Council 170); one saying any difference "might be referred" to one of the Judges of the Supreme Court (federal Order in Council of February 23, 1877); and one saying any difference "could be referred" to one of the Judges of the Supreme Court (provincial Order in Council of January 30, 1877).

Submissions of the Parties

Canada argues that it did not have a mandatory obligation to refer "differences" between Commissioner Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. It emphasizes that direct reference is made in dominion Order in Council 170 to the federal Order in Council of February 23, 1877. Therefore, Canada submits, it is necessary to consider the wording of the latter Order in Council to determine the circumstances under which a reference was to be made to a Judge of the Supreme Court. The Order in Council of February 23, 1877, provides that references in the event of "any difference" "might" be made to one of the Judges of the Supreme Court. In addition, the provincial Order in Council of January 30, 1877, provides that references in the event of "any differences" "could" be made to one of the Judges of the Supreme Court. Relying on the dictionary definitions of "might,"

---

[111] A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1). Emphasis added.

"could," and "can – definitions that suggest an overriding theme of possibility or permission – Canada concludes that a referral of differences to a Judge of the Supreme Court was a discretionary rather than a mandatory process.[112]

The claimant submits that, despite the word "might in the Order in Council of February 23, 1877, it was mandatory that Canada refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court. In support of its position, the claimant argues that there are a number of cases in which the courts have interpreted enabling or empowering words (such as "may") as mandatory.[113]

Terms of Dominion Order in Council 170

If one views the terms of dominion Order in Council 170 in isolation, the referral of "differences" to a Judge of the Supreme Court seems to be imperative. Instead of a term expressing a possible or permissible referral, such as "could" or "might," Order in Council 170 uses the mandatory phrase "to be referred." One could argue, therefore, that the change in wording between Order in Council 170 and the previous Orders in Council signalled a change from a discretionary to a mandatory dispute resolution process.

However, as Canada points out, Order in Council 170 makes direct reference to the Order in Council of February 23, 1877: "in the event of any difference between the Commissioner and Mr. Sproat the matter to be referred to one of the Judges of the Supreme Court *as provided by that Order in Council* [Order in Council of the 23rd

---

[112] Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 36-39.

[113] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 19-22.

February 1877]" (emphasis added). Therefore, it appears that at least part of the Order in Council of February 23, 1877, was incorporated into Order in Council 170, but which part? One possibility is that the words "as provided by that Order in Council" relate only to the identification of the referee – one of the Judges of the Supreme Court. A second possibility is that the words "as provided by that Order in Council" relate to the whole dispute-resolution process.

We tend to think that the second possibility is the most plausible and that the words "might be referred" were incorporated into Order in Council 170. This approach is supported by later correspondence which indicates that the procedure described in the Order in Council of February 23, 1877, was meant to govern the actions of Commissioner Sproat. For example, after the dominion government passed Order in Council 170 appointing Mr. Sproat as sole Indian Reserve Commissioner, the Minister of the Interior sent a telegram to the Lieutenant Governor of British Columbia stating as follows: "Please carry out order of February seventy seven respecting Indian Comm. substituting Sproat for Indian Supt."[114]

Case Law

Even if the words "might be referred" were incorporated into Order in Council 170, we have yet to consider the circumstances in which the courts have construed empowering words, such as "might," as mandatory. One of the seminal cases in this area of the law is the House of Lords decision in *Julius v. Lord Bishop of Oxford*.[115] In that case, four judges considered whether the words "it shall be lawful" in the

---

[114] David Mills, Minster of the Interior, to A.N. Richards, Lieutenant Governor of British Columbia, March 15, 1878 (ICC Exhibit 5).

[115] *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 (HL).

Church Discipline Act imposed a duty rather than a discretion to act. (We note that the words "it shall be lawful" are equivalent to the word "may.") In his reasons for judgment, Lord Chancellor Earl Cairns outlined the following principles of interpretation:

> The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. . . . And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.[116]

Lord Penzance and Lord Selbourne, similar to the Lord Chancellor, stressed the importance of context:

> [Lord Penzance:] The words "it shall be lawful" are distinctly words of permission only – they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled –to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have

---

116 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 222-23 (HL).

> been conferred – they do, or do not create a duty in the person on whom it is conferred, to exercise it.[117]
>
> . . .
>
> [Lord Selbourne:] The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.[118]

Lord Blackburn held as follows:

> . . . enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. . . . I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power.[119]

In his written submissions, legal counsel for the claimant states that "[t]he linchpin of the test is the determination of whether the enabling words 'effectuate a

---

117 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 229-30 (HL).

118 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 235 (HL).

119 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 244 (HL).

legal right' or not."[120] He argues that, in this case, the Federal Crown had the ability to 'effectuate a legal right' by referring the matter to a judge of the Supreme Court."[121]

Canada takes the position that there was no "legal right" to effectuate. In his oral submissions, Mr. Becker, counsel for Canada, explained as follows:

> Now, in this case we are dealing with, again, a process by which the provincial and federal governments were attempting to set aside reserves for bands. . . . it's our submission that there is no private right to have reserve land set aside in any particular quantum or location. That . . . is entirely a subject matter for the exercise of the royal prerogative.
>
> Accordingly, it's our submission that these cases [the cases cited by the claimant including *Julius*] are inapplicable as there is no underlying right which would be effected in this case. In other words, the decision whether to refer the disagreement to the judge, that decision was not required to effectuate a legal right because there was no legal right to effectuate.[122]

The claimant referred us to the British Columbia Supreme Court decision in *Re Shaughnessy Golf and Country Club*,[123] which provides some assistance in determining whether the object of the power granted to Canada in the Order in Council was to effectuate a legal right. In the *Shaughnessy* case, section 395A(10) of the *Vancouver Charter* provided that the City Council "may enter into an agreement with Shaughnessy Golf and Country Club fixing the amount that shall be deemed to

---

120 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 20.

121 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 22.

122 ICC Transcript, September 21, 1995, pp. 131-32.

123 *Re Shaughnessy Golf and Country Club* (1967), 61 DLR (2d) 245 (BCSC).

be the assessed value of the latter's interest in the land presently maintained as Shaughnessy Golf and Country Club." The issue before Mr. Justice Verchere was whether the word "may" was permissive or mandatory. As the claimant notes, the absence of any term in the legislation pertaining to the resolution of disputes was central to his finding that the word was permissive:

> . . . the power granted here was only the power to enter into, that is to say become a party to, an agreement and the statute is silent on what can, should or must occur if an agreement is not reached. Neither Council nor Shaughnessy is required to capitulate and accept the amount proposed by the other; neither of them is required to accept adjudication or arbitration in the event of dispute; furthermore, neither of them is required to commence bargaining on notice from the other or to make reasonable effort to conclude an agreement. If the Legislature had intended to give Shaughnessy the right to an agreed assessed value of its golf-course lands it would, in my opinion, have provided for some of those conditions or for other similar ones which would make the alleged right capable of being recognized, asserted and enforced by specific performance.
>
> In my opinion Shaughnessy has failed to demonstrate that the object of the power granted to Council by s. 395A(10) was to create or effectuate a legal right on its part to the assessment of its golf-course lands . . . In particular, it has failed to demonstrate the existence of a legal right on its part by which Council is required to agree to an amount that shall be deemed to be the assessed value of those lands.[124]

---

[124] *Re Shaughnessy Golf and Country Club* (1967), 61 DLR (2d) 245 at 252-53 (BCSC). As acknowledged by the claimant, Mr. Justice Verchere relied on section 23 of the *Interpretation Act*, RSBC 1960, c. 199, which provides:

> 23. In construing this or any Act of the Legislature, unless it is otherwise provided, or there is something in the context or other provisions thereof indicating a different meaning, or calling for a different construction,
>
> (*a*) the word "shall" is to be construed as imperative, and the word "may" as permissive.

The circumstances of the 'Namgis case, of course, are quite different. Unlike the *Shaughnessy* case, Canada and British Columbia had agreed upon a dispute-resolution process in the event of a difference between Mr. Sproat and the Commissioner of Lands and Works. By expressly providing for adjudication by a Judge, arguably both levels of government, to use the words of Mr. Justice Verchere, "intended to give" the 'Namgis and other First Nations "the right" to a reserve.

In any event, in our view, the question of whether the word "might" should be construed as discretionary or obligatory is to be answered from the context and object of the relevant Orders in Council. This was the general approach advocated by several of the judges in *Julius* and an approach which we find particularly useful here.

Mr. Becker addressed the matter of context briefly in his oral submissions:

> Now, it's also interesting to note that these orders-in-council were not formally drafted documents, but in fact some of these orders-in-council were basically incorporated by reference letters and telegraph messages. I mean, these orders-in-council did not go through the serious rigorous drafting process, and I think that's important here as well in terms of looking at the context.
>
> These orders-in-council often merely reflected a letter that had been sent back and forth and had been incorporated by reference. I think that it goes quite far to suggest that using a word like "might" or "could" in ordinary language in a letter that is subsequently appended to the -- or incorporated by a reference to the order-in-council would suggest anything other than the ordinary meaning of "might" or "could," which, again, is one of permissiveness.[125]

However, Mr. Justice Verchere equated section 23 with the principles established in *Julius*: ". . . it is necessary , as Earl Cairns, L.C. [in *Julius*], stated above, and as the words of the *Interpretation Act* indicate, to canvass the nature and object of the legislation and the conditions under which the thing provided for is to be done" (252).

[125] ICC Transcript, September 21,1995, pp. 128-29.

We take a broader view of context than the physical drafting process for the Orders in Council. As we see it, the key consideration is the goal Canada was attempting to achieve by Mr. Sproat's appointment and by the creation of the whole reserve commission process.

The Joint Reserve Commission was established "with a view to the speedy and *final adjustment* of the Indian Reserve question in British Columbia on a satisfactory basis."[126] This finality was emphasized by Mr. Scott, Acting Minister of the Interior, in his memorandum of November 5, 1875: "the undersigned submits that no scheme for the settlement of this question can be held to be satisfactory which does not provide for its prompt and final settlement."[127] These sentiments were reiterated by British Columbia in its Order in Council of January 6, 1876:

> With respect to the appointment of Commissioners, as suggested instead of Agents, the Committee feel that strictly speaking the Province should not be responsible for any portion of the expense connected with the charge or management of Indian affairs which are entrusted by the Terms of Union to the Dominion Government; but regarding a *final settlement* of the land question as most urgent and most important to the peace and prosperity of the Province they are of opinion and advise that all the proposals . . . should be accepted.[128]

---

[126] Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, p. 46), adopted by federal Order in Council PC 1033, November 10, 1875 (ICC Documents, p. 49a). Emphasis added.

[127] Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, p. 46). Emphasis in the original.

[128] Provincial Order in Council 1138, January 6, 1876 (ICC Documents, pp. 50-51). Emphasis added.

There is no reason to think that the objective of "finally settling" the land question changed with the dissolution of the Joint Commission and the appointment of Mr. Sproat as sole Indian Reserve Commissioner.

To prevent a potential stalemate between Mr. Sproat and the Commissioner of Lands and Works, Canada and British Columbia agreed that the decision of a Judge of the Supreme Court "should be final." In fact, the two governments went further and agreed that they would share the cost of the referee. It would therefore seem strange if Canada, when it drafted Order in Council 170, did not intend a reference to be made to a Judge of the Supreme Court in the event of a difference between Mr. Sproat and the Commissioner of Lands and Works. Without such a reference, there would be no way of ensuring that the dispute would be resolved to the satisfaction of both levels of government and the matter "finally settled" in a timely way. For example, if Mr. Trutch had concurred with Mr. Sproat's allotment, it is not at all certain that British Columbia would have accepted his opinion. The only dispute-resolution mechanism to which ***both*** Canada and British Columbia had agreed was a reference to a Judge of the Supreme Court (with the possible exception of a reference to the Secretary of State for the Colonies pursuant to Article 13 of the *Terms of Union, 1871*).

In short, given the underlying objective of the reserve commission process, we find that the word "might" in the Order in Council of February 23, 1877, should be construed as mandatory. However, it is important to keep in mind that the obligation to refer a matter to a Judge only arose in the event of a "difference" between Mr. Sproat and the Chief Commissioner of Lands and Works.

Existence of a "Difference"

It is almost indisputable that there was a "difference" between Mr. Sproat and the Chief Commissioner of Lands and Works, and also between Canada and the Chief Commissioner of Lands and Works. Canada did not accept without question the latter's decision to disallow Mr. Sproat's allotment on Cormorant Island, as is evident from the fact that it referred the matter to Mr. Trutch for his opinion. Even after Mr. Trutch gave his opinion in support of the disallowance, officials from the Department of Indian Affairs continued to voice their dissatisfaction with British Columbia's position on the Cormorant Island allotment. For example, Indian Agent George Blenkinsop, on learning that Mr. Spencer had renewed the lease on Cormorant Island, wrote to Indian Superintendent Powell as follows:

> I have . . . the honor to bring to your notice the unfortunate position in which we are placed by [the provincial] Government ignoring the decision of the late Reserve Commissioner, Mr. G.M. Sproat.
>
> The Indians are now here by sufferance, only, according to Mr. Spencer's view of the case.
>
> There is, however, abundant evidence to prove, both by living testimony and by the remains and relics of by-gone days, that Alert Bay was, formerly, the home of a large Indian population. . . .
>
> The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects.
>
> The present occupants are surely bound by this action of Mr. Huson.[129]

---

[129] George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

Indian Superintendent Powell, in turn, expressed concern with the regranting of the lease to Mr. Spencer in view of the fact that a large Indian village existed on the land.[130]

Considering the lingering discontent with the situation on Cormorant Island, and given our legal and factual analysis as set out above, we find that Canada had a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court.

ISSUE 2

Did Canada have a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

Submissions of the Parties

The claimant submits that even if Canada did not have a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court, it had a fiduciary obligation to do so:

> Even if the language [of the Order in Council] is not seen to be mandatory, this obligation existed, given the fiduciary relationship. In other words, it was either mandatory or, alternatively, it was discretionary and the Crown, owing a fiduciary duty to the Band, was obliged to exercise that discretion and refer the matter.[131]

---

130 I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

131 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 22.

In support of its position, the claimant states that there are numerous recent court decisions which set forth the proposition that "the Federal Crown, and perhaps also the Provincial Crown, owes a fiduciary duty to Indians."[132] Applying the characteristics of a fiduciary relationship enunciated by Madam Justice Wilson in *Frame v. Smith*, and by Mr. Justice La Forest in *Hodgkinson v. Simms*, the claimant argues that Canada had sole discretion to protect the claimant's interests: "the only way the Band could have had Mr. Sproat's allotment of most of Cormorant Island to it upheld was by the Federal Crown exercising its discretion and having the matter referred to a Judge of the Supreme Court, as had been contemplated, or alternatively to the Secretary of State for the Colonies pursuant to Article 13 of the Terms of Union between Canada and British Columbia."[133] Since Canada was not required to obtain the province's agreement to such a referral, the claimant maintains that Canada had the power and ability to exercise its discretion unilaterally. Finally, the claimant submits that it was vulnerable to the exercise of Canada's discretion, since a referral to a Judge of the Supreme Court was the only dispute-resolution mechanism available when the Commissioner of Lands and Works disallowed the allotment, other than a referral to the Secretary of State for the Colonies, which would have been more cumbersome.[134]

Canada denies that it had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court. It submits that there was no statute, agreement, or unilateral undertaking that it would act for, on

---

132 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 15.

133 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 17.

134 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 17.

behalf of, or in the best interests of the claimant in the circumstances of this claim. More specifically, Canada argues that:

- The relevant Orders in Council, which set out the process to allot reserves for Indian bands in British Columbia, were not statutes, but an exercise of the Royal Prerogative.
- The Orders in Council were not an agreement between the claimant and Canada or, even more generally, between Indian bands in British Columbia and Canada since there is no evidence that the claimant or the Indian bands were consulted in the formation of the Orders in Council or even knew of the existence of the terms of the Orders in Council at the time of the reserve allotments.
- There was no mutual understanding between the claimant and Canada that Canada had relinquished its own self-interest and had agreed to act solely on behalf of the claimant; in other words, there was no unilateral undertaking. In particular:
  - as mentioned above, there is no evidence that Indian bands were consulted in the formation of the Orders in Council or even knew of the existence of the terms of the Orders in Council;
  - the allotting of reserves for Indian bands in British Columbia was a joint political process between the federal and the provincial governments;
  - the Orders in Council required Mr. Sproat to take into account the claims of white settlers as well as the habits, wants, and pursuits of the Indians; and

- the Orders in Council did not require Canada to challenge rejections by the Chief Commissioner of Lands and Works or to refer "differences" to a Judge of the Supreme Court.

Moreover, Canada maintains that it did not have the power or the discretion unilaterally to affect the claimant's legal or practical interests. Rather the creation of reserves in British Columbia was a political process that required a joint decision by both the federal and the provincial governments.

In any event, Canada submits that reserve creation in British Columbia is in the nature of a public law duty, not a private law duty, and therefore does not give rise to legally enforceable fiduciary duties.[135]

Public versus Private Law Duty

At the outset, we do not accept Canada's argument that reserve creation in British Columbia is in the nature of a public law duty and therefore does not give rise to legally enforceable fiduciary duties. The issue of public versus private law duties was discussed by Mr. Justice Dickson (as he then was) in *Guerin v. R.*[136] He held as follows:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise

---

135 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 3-5, 30-39.

136 *Guerin v. R.* (1984), 13 DLR (4th) 321 (SCC).

> of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is none the less in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[137]

Earlier in his decision, Mr. Justice Dickson discussed in more depth the "political trust" cases mentioned above:

> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
>
> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *A.-G. Que. v. A.-G. Can.* (1920), 56 D.L.R. 373 at pp. 378-9, [1921] 1 A.C. 401 at pp. 410-11 (the *Star Chrome* case).[138]

Canada argues that these passages in *Guerin* do not help the claimant in this case. Mr. Becker explained as follows in his oral submissions:

---

137 *Guerin v. R.* (1984), 13 DLR (4th) 321 at 341 (SCC).

138 *Guerin v. R.* (1984), 13 DLR (4th) 321 at 336-37 (SCC).

Now, in [*Guerin*] they were dealing with surrendered reserve lands, and while [Justice Dickson] does not distinguish between surrendered reserve lands and aboriginal titled lands, we have to here. We're [sic] don't have before us any information in terms of whether the band has an aboriginal title to these lands, and in fact we're not really entitled to deal with it in this process in any event.

Now –

THE CHAIRPERSON [COMMISSIONER PRENTICE]: So you're saying that the duty to set up reserves is a public law duty? Once the reserves are set up, the band has an interest and it becomes a private law duty at that point?

MR. BECKER: Yes, it becomes, as Justice Dickson says, it becomes in the nature of a private law duty, yes.

Now, again, I would like to emphasize, and I'm sure the point's been made by now, but these lands were merely proposed to be reserve. I mean, Sproat went out and allotted them, but that allotment was subject to confirmation by the B.C. government. That confirmation did not ever arrive. It was disallowed by the B.C. government. Therefore these lands never became reserve. They never achieved the status that would have afforded them the same sort of analysis that Dickson gives these surrendered reserve lands in Guerin where it's analogous or in the nature of a private law duty.

So in light of that state of affairs, it's difficult to conceive, and we submit that there is no basis to hold, that there is a duty to refer disagreements between Sproat and the provincial government to a judge.

Since the underlying act of setting aside reserve lands is in the nature of a public law duty and there is no right of the band to compel Canada to set aside the lands in the first place, there's similarly no right which would compel Canada to seek the intervention of this judge, the possibility for which was provided for in these orders-in-council.[139]

---

139 ICC Transcript, September 21, 1995, pp. 125-27.

And later in his oral submissions:

> THE CHAIRPERSON: Why do you say that – I'll go back to this question of private duties, public law duties. Why do you say there was no duty on the part of Canada to submit the matter to arbitration as per the reciprocal orders-in-council?
>
> MR. BECKER: Well, it's fundamentally premised on the fact that there's no pre-existing right of the band to which Canada would be compelled to act for their benefit. I mean, if this was reserve land already and the band had an established interest in the land as a reserve and there was some kind of analogous process that Canada was required to take, it would very likely be a different story. But these are lands, again, putting aside the aboriginal title issue, these are lands that were provided – were going to be provided by Canada if all things had gone well, and were allotted by Sproat, but to which the band, other than through some aboriginal rights type claim had no legal claim.[140]

The difficulty we have with Canada's argument is that it is based on the premise that a band has an "interest" only after a reserve has been created. This is inconsistent with Mr. Justice Dickson's statement in *Guerin* that the Indians' interest in their lands "is a pre-existing legal right" and that this interest is the same whether one is concerned with the interest of a band in a reserve or with unrecognized aboriginal title in traditional tribal lands. In other words, as we understand Mr. Justice Dickson's reasons, there is an independent legal interest in the land even before the reserve is created. Any obligation with respect to this interest is in the nature of a private law duty. We find, therefore, that it is possible for an enforceable fiduciary obligation to arise in the reserve creation process. The remaining question is whether Canada, in fact, had a fiduciary obligation in this case.

---

140 ICC Transcript, September 21, 1995, p. 135.

Determining the Existence of a Fiduciary Obligation

In coming to the conclusion that it did not have a fiduciary obligation in the circumstances of this case, Canada uses the following test:

> In order to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:
>
> (a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;
>
> (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
>
> (c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.[141]

Canada cites the cases of *Guerin v. R.* and *Frame v. Smith* (approved by *Hodgkinson v. Simms*) in support of its test.[142]

With respect to the term "undertaking," Canada elaborates as follows:

> In *Hodgkinson v. Simms*, La Forest, J. gives some indication of when an undertaking may give rise to a fiduciary obligation. He states at 629 and 632:
>
> > In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably

---

[141] Submissions on Behalf of the Government of Canada, September 11, 1995, p. 31.

[142] *Guerin v. R.* (1984), 13 DLR (4th) 321 at 341 (SCC); *Frame v. Smith* (1987), 42 DLR (4th) 81 at 99 (SCC) (approved *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), per La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666).

> have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. . . .
>
> In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal or practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "There is no substitute in this branch of the law for a 'meticulous examination of the facts": see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831.[143]

Canada concludes that "the existence of an undertaking by the Crown giving rise to fiduciary duties is determined on the basis of the *mutual understanding* of both the Crown and the Indians that Canada has *relinquished its own self-interest* and agreed to act *solely* on behalf of the Indians."[144]

In our view, Canada's test confuses the case law. The basic structure for Canada's test comes from the decision of Madam Justice Wilson in *Frame v. Smith*.[145] She proposed the following three-part analysis for the identification of relationships that presumptively give rise to fiduciary obligations:

---

143 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 32. Underlining added by Canada.

144 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 32. Emphasis added by Canada.

145 *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

> . . . there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[146]

Unlike the first element in Canada's test, Madam Justice Wilson did not specify that a "statute," "agreement," or "unilateral undertaking" must be present in order for the relationship to be one in which a fiduciary obligation will be imposed.

We assume that Canada derived the first element of its test from the *Guerin* case, where Mr. Justice Dickson held as follows:

> Professor Ernest Weinrib maintains in his article "The Fiduciary Obligation," 25 U.T.L.J. 1 (1975), at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are

---

[146] *Frame v. Smith* (1987), 42 DLR (4th) 81 at 98-99 (SCC). Although Wilson J. wrote in dissent, her list of characteristics was adopted by a majority of the Supreme Court of Canada in subsequent cases. See, for example, *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC), per La Forest J. at 29, and per Sopinka J. at 62-63; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), per La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666.

> therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[147]

In essence, Canada substitutes part of the *Guerin* analysis for the first characteristic in Madam Justice Wilson's "rough and ready guide," and then implies that this one amalgamated test must be satisfied for a fiduciary obligation to arise. We have difficulty with this approach for a number of reasons. First, the fact that Mr. Justice Dickson was careful to state in *Guerin* that he was making "no comment upon whether this description is broad enough to embrace all fiduciary obligations" indicates that he did not intend his remarks to form an exhaustive test. Second, Madam Justice Wilson did not include the criteria of "statute," "agreement," or "unilateral undertaking" in the first element of her "rough and ready guide" even though Mr. Justice Dickson's decision in *Guerin* was available to her when she wrote her decision in *Frame v. Smith*. We also note that in a more recent case, *M.(K.) v. M.(H.)*, Mr. Justice La Forest, after referring to Mr. Justice Dickson's reasons in *Guerin*, said that he "would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by

---

147 *Guerin v. R.* (1984), 13 DLR (4th) 321 at 340-41 (SCC).

the fiduciary."[148] Therefore, in our opinion, the proper approach in the circumstances of this claim, is that set out in *Frame v. Smith*. In other words, the first element should be the "scope for the exercise of some discretion or power," and not the existence of "a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person."

We also have difficulty with Canada's use of Mr. Justice La Forest's comments in *Hodgkinson v. Simms*, in support of its statement that "the existence of an undertaking by the Crown giving rise to fiduciary duties is determined on the basis of the mutual understanding of both the Crown and the Indians that Canada has relinquished its own self-interest and agreed to act solely on behalf of the Indians." Mr. Justice La Forest's comments, in context, were part of a discussion concerning two different uses of the term "fiduciary." He summarized the first use of the term, as follows:

> The first [use of the term fiduciary] is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis [in *Frame v. Smith*] is a useful guide.[149]

Mr. Justice La Forest then moved into a description of the second use of the term "fiduciary":

---

148 *M.(K.) v. M.(H.)* (1992), 14 CCLT (2d) 1 at 41 (SCC).

149 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

> As I noted in [*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary," viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see supra, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.[150]

Contrary to Canada's suggestion, we do not see Mr. Justice La Forest's statement regarding a "mutual understanding that one party has relinquished its own self-interest . . ." as defining the circumstances in which an "undertaking" will give rise to a fiduciary obligation in the context of a *Guerin*-type or *Frame v. Smith*-type analysis. Rather, this statement is an elaboration of the second use of the term "fiduciary." As we understand Mr. Justice La Forest's reasons, fiduciary obligations may arise where *either* the first use *or* the second use of the term is involved. Therefore, if the relationship falls within the *Frame v. Smith* analysis (in other words, it falls within the first use of the term), it is unnecessary to establish that there is a "mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."

---

150 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

Application of the *Frame v. Smith* Guide

We turn, then, to an application of the *Frame v. Smith* "rough and ready guide." In our view, it is readily apparent that the three characteristics identified by Madam Justice Wilson are satisfied in the circumstances of this claim. Assuming for the moment that the relevant Orders in Council did not create a mandatory obligation to refer "differences" between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court, they at least created a discretion or a power to do so. The exercise of this discretion had the capacity to affect the extent and locality of the lands to be held in trust for the use and benefit of the claimant and, thus, the claimant's legal and practical interests.

We disagree with Canada that its discretion could not be exercised unilaterally so as to affect the claimant's interests. As we see it, the issue in this case is not whether Canada had unilateral discretion to set apart reserves in British Columbia, but whether Canada had unilateral discretion to refer disputes to a Judge of the Supreme Court. Although a joint decision by both the federal and the provincial governments may have been required to create a reserve, a joint decision was not required to refer a matter to a Judge. Canada could unilaterally exercise its discretion in this regard; a referral did not depend on either the province's or the claimant's approval.

Furthermore, Canada seems to have overlooked the fact that the process in question, a referral to a Judge of the Supreme Court, was approved by both levels of government. As such, there is a strong argument that whatever the decision of the Judge, both parties would have respected and considered themselves bound by it. Therefore, if the Judge had decided in favour of Commissioner Sproat's allotment, the reserve on Cormorant Island would have encompassed most of the island, since the province would have been obliged to implement the Judge's decision.

Finally, there can be no doubt that the requisite vulnerability is present. The claimant, itself, did not have the power to refer a difference between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. Under the process established by the Orders in Council, Canada's intervention was required. We might also point out that it was virtually impossible for the claimant to pre-empt land under the provisions of the provincial *Land Act* in force at the time.[151] As a result, the claimant was powerless to set apart lands for its use and benefit without Canada's assistance.

In sum, taking into account the factual circumstances of this case and the indicia of a fiduciary relationship set out in *Frame v. Smith*, we find that Canada had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the Supreme Court.

ISSUE 3

> **In the alternative, did Canada have an obligation pursuant to Article 13 of the *Terms of Union, 1871*, to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to the Secretary of State for the Colonies?**

At the oral hearing, Canada objected to the inclusion of the claimant's alternative argument that Canada ought to have referred the rejection of Commission Sproat's allotment to the Secretary of State for the Colonies pursuant to the *Terms of Union, 1871*. Mr. Becker advised that this argument was not one of the claimant's original

---

[151] Sections 3 and 24 of the *Land Act, 1875*, SBC 1875, No. 5, provided that the right to record unsurveyed land or to pre-empt surveyed land did not extend "to any of the Aborigines of this Continent, except to such as shall have obtained permission in writing . . . by a special order of the Lieutenant-Governor in Council."

arguments and that he had become aware that it was being pursued only when he received the claimant's written submissions.

Mr. Ashcroft clarified that the claimant's argument in relation to the *Terms of Union, 1871*, was an alternative or buttressing position and that, from the claimant's perspective, it was unnecessary to go beyond the fact that there was an outstanding lawful obligation to refer the matter to a Judge of the Supreme Court.

It was agreed at the hearing that if the Commission felt it necessary to hear further on this issue, counsel for both parties would be given an opportunity to provide additional submissions.[152] However, given our findings in Issues 1 and 2 that Canada had an obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court, we do not consider it necessary to address whether an obligation also arose from Article 13 of the *Terms of Union, 1871*.

ISSUE 4

If the answer to Issue 2 or 3 is yes, did Canada fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion?

Submissions of the Parties

Although Canada maintains that it was not required to take any steps following the rejection of Commissioner Sproat's allotment, it submits that it nonetheless acted reasonably to investigate the "difference" between Commissioner Sproat and the Chief Commissioner of Lands and Works by obtaining an opinion from its confidential agent, Joseph Trutch. When attention was once again drawn to the situation on Cormorant Island two years later, Canada argues that it acted in a

---

152 ICC Transcript, September 21, 1995, pp. 60-65, 158.

reasonable manner by agreeing that Commissioner O'Reilly should proceed to the Island to allot reserve lands for the claimant.[153]

The claimant submits that the referral of the matter to Mr. Trutch did not fulfil Canada's duty to the claimant. Sending the matter to Mr. Trutch did not accord with the dispute-resolution mechanism already in place and, since Mr. Trutch was the Chief Commissioner of Lands and Works for the province at the time the lease was signed, he was not an appropriate person to make recommendations in this case.[154]

Reasonableness of Canada's actions

The Order in Council appointing Commissioner Sproat delineates a specific dispute-resolution process – a referral to a Judge of the Supreme Court. Of significance here is the fact that the Order in Council does not provide a discretion as to the referee; it clearly states that the matter is to be referred to a Judge of the Supreme Court and not some other person chosen unilaterally by Canada. As discussed above in Issue 1, this was the procedure to which both Canada and British Columbia agreed.

It is interesting to note that an earlier version of the Provincial Secretary's letter of January 27, 1877, left some latitude for the selection of a referee other than a Judge. In a letter dated January 20, 1877, the Provincial Secretary wrote:

> In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendent of Indian Affairs as to size or extent of Lands to be allotted to any Indian tribe the matter could be

---

153 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 5, 39-41.

154 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 22-24.

> referred to one of the Judges of the Supreme Court *or other person agreed upon,* whose decision should be final.[155]

The Provincial Secretary's letter of January 27, 1877, omitted the words "or other person agreed upon."[156] It was this letter of January 27, 1877, that formed the foundation for the provincial Order in Council of January 30, 1877, and the federal Order in Council of February 23, 1877. Thus, we can surmise that the option of an alternative referee was considered and rejected.

In light of the above considerations, it seems to us that Canada was obliged to follow the procedure set out in the Order in Council appointing Commissioner Sproat. As the claimant points out, Mr. Trutch did not have power to do anything other than offer his views on the situation to Sir John A. Macdonald.[157]

The wisdom of referring the matter to Mr. Trutch is also worthy of examination. Canada maintains that it was reasonable for it to ask Mr. Trutch to review the rejection of Commissioner Sproat's allotment since Mr. Trutch was very knowledgable in Indian matters and, therefore, was able to complete his review in an expedited manner, taking less than one week after he received the relevant documents.[158] We disagree with Canada's assessment. While Mr. Trutch, as confidential agent, may have been a logical choice for such a task in ordinary circumstances, in our view he was not a

---

155 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 20, 1877 (ICC Documents, pp. 52-55). Emphasis added.

156 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

157 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 23.

158 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 40.

logical choice in these circumstances. At issue was the validity of the objections raised by the provincial government with respect to Commissioner Sproat's allotment on Cormorant Island. As discussed earlier in this report, the Chief Commissioner of Lands and Works opposed the allotment on two grounds: first, the he had informed Mr. Sproat that the local government would not accept any Indian reservations made by Mr. Sproat on the northwest coast; and second, the whole island had been leased since August 3, 1870, to Mr. Huson and others. The lease to Mr. Huson was signed by Benjamin William Pearse, Assistant Surveyor General, "acting on behalf of the Government of British Columbia in the temporary absence of the Honorable Joseph William Trutch the Chief Commissioner of Lands and Works and Surveyor General."[159] Since Mr. Trutch was the Chief Commissioner of Lands and Works at the time the lease was signed, it was imprudent, in our opinion, for Canada to solicit his views on the second ground raised by the province. We recognize that Mr. Pearse, and not Mr. Trutch, signed the lease. However, it is likely that the two men had a working, if not a reporting, relationship. Therefore, the ability of Mr. Trutch to evaluate the status of the lease objectively was at least questionable. A person with a more neutral mind might have been more disposed to challenge the validity of the lease and to discover whether there were circumstances under which the lease could be terminated.

Mr. Trutch's former position as Chief Commissioner of Lands and Works is particularly troublesome when one takes into account that his opinion hinged on the status of the lease as opposed to the other objection raised by the province. In other words, while we accept that Mr. Trutch was able to provide an impartial opinion on the province's first ground for rejecting the allotment on Cormorant Island, this first

---

[159] Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

ground did not carry the day; he found it to be "of questionable validity." It was the province's second ground – the existence of a lease over the whole island – that Mr. Trutch found to be "clearly valid and insurmountable."

There is evidence, however, that the province's second objection was not "insurmountable." There were a number of ways in which the lease could have been terminated. For instance, the lease itself provided a mechanism for its termination by virtue of the following clause:

> Provided always and it is hereby agreed and declared that if at any time during the continuance of the tenancy hereby created it shall be considered desirable by the Government for the time being to resume possession of that portion of the hereditaments and premises hereby demised already reserved and situate at the western end of the said Island and colored red on the said plan hereunto annexed or of any other portion of the said hereditaments and premises hereby demised or intended so to be The said Joseph William Trutch or other the Chief Commissioner of Lands and Works and Surveyor General for the time being shall give to the said Alden Wesley Huson – Elijah Tomkins Huson – Uriah Nelson and Edmund Abraham Wadhams their executors administrators or assigns two Calendar months notice of such intention in writing by either leaving such notice with them or by posting such notice on some conspicuous part of the premises at the expiration of which notice it shall be lawful for the said Joseph William Trutch as Chief Commissioner of Lands and Works or other the Chief Commissioner of Lands and Works for the time being to enter upon and possess himself on behalf of the Crown of the land mentioned in such notice – Provided that in every such case there shall be a proportionate deduction of the rent hereby reserved proportioned to the amount of land so entered upon and repossessed by the Chief Commissioner for the time being on behalf of the Crown as aforesaid . . .[160]

---

[160] Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

It is clear that Canada was aware of this clause in the lease. Mr. Trutch discussed it in his memorandum of May 5, 1882, and it was drawn to the attention of the Superintendent General of Indian Affairs in February 1884 by both Commissioner O'Reilly and the Indian Superintendent, I.W. Powell.[161] It is true that Mr. Trutch gave very little weight to the clause. In his memorandum he stated:

> Power is indeed reserved to the Government of British Columbia in the Indenture of Lease to resume possession of the whole or any portion of the premises thereby demised, upon giving two (2) months notice to the Lessees. But the exercise of this right is entirely in the discretion of that Government, and was certainly not intended to be, and doubtless will not be taken advantage of except on grounds of the requirements of the public interests, and upon payment of just compensation to the Lessee's; and it is evident from the letter of the Chief Commissioner of Lands and Works now under consideration that such requirements are not held by the Government of British Columbia to exist, in connection with Mr. Sproat's unauthorized appropriation of Cormorant Island as an Indian Reservation.[162]

However, the Province's position, and Mr. Trutch's acceptance of it, is problematic. The allotment of reserves did involve "the requirements of the public interests". Mr. Trutch implied as much when he wrote to Sir John A. MacDonald in May 1880 regarding possible replacements for Commissioner Sproat:

---

161 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15); P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27); I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

162 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

> Either Mr. Ball or Mr. O'Reilly I consider particularly adapted from personal qualifications, and long experience in administrative capacities in connection with Indians and Indian Affairs in this Province to discharge with advantage to *the public interests* the important and somewhat difficult duties of Indian Reserve Commissioner.[163]

The "public interest" nature of reserve creation was also recognized by the province in its Order in Council approving the establishment of the Joint Reserve Commission: ". . . regarding a final settlement of the land question as most urgent and most important to the peace and prosperity of the Province they [the Committee] are of opinion and advise that all the proposals . . . should be accepted."[164]

As we see it, the lease was not, and should not have been seen to be, an "insurmountable" problem unless the province had some cogent reason for refusing to exercise its resumptive powers under the lease. It would have taken very little analysis on Canada's part to realize that the reasons provided by Mr. Trutch were less than compelling.

Another clause in the lease prohibited assignments of the lease without the consent in writing of the Chief Commissioner of Lands and Works.[165] There is evidence that the lease was assigned at least twice. On February 6, 1882, U. Nelson and E.A. Wadhams notified the Chief Commissioner of Lands and Works that they

---

163 Joseph W. Trutch to Sir John A. Macdonald, May 19, 1880 (ICC Exhibit 2, vol. 2, tab 50). Emphasis added.

164 Provincial Order in Council 1138, January 6, 1876 (ICC Documents, pp. 50-51).

165 Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

had assigned and transferred their interests in the lease to A.W. Huson.[166] A.W. Huson, in turn, transferred the lease to T. Earle and S. Spencer in January 1884.[167]

Canada submits that there is no evidence that the assignments of the lease would have been known to the Department of Indian Affairs or that the consent of the Chief Commissioner of Lands and Works was not obtained.[168] We disagree. On February 27, 1884, Indian Superintendent Powell wrote to the Superintendent General of Indian Affairs as follows:

> Upon inquiry at the land office it would appear that Mr. Huson has transferred his right to the lease to Mr. Spencer but so far as the Surveyor General is aware no official sanction has as yet been given by Mr. Smithe [the Chief Commissioner of Lands and Works] to the conveyance.[169]

Thus, at least with respect to the second assignment, there is clear evidence that the Department of Indian Affairs knew that the assignment had taken place and that written consent had not been obtained from the Chief Commissioner of Lands and Works as of February 27, 1884.

But, argues Canada, even if the consent of the Chief Commissioner was not obtained for the assignment of the lease, the province was "estopped" (in other words,

---

166 Uriah Nelson and E.A. Wadhams to the Chief Commissioner of Lands and Works, February 6, 1882 (ICC Documents, p. 202).

167 Date is taken from A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

168 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 56.

169 I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

precluded) from claiming that the lease was invalid since it continued to treat the lease as valid after it was aware of the assignment to Mr. Spencer: "It would be inequitable for the Province to claim that the lease was invalid on grounds which it was aware of and which it consented to by reason of continuing to treat the lease as valid. The assignees of the lease relied on the Province continuing to treat the lease as valid."[170] Further, argues Canada, even if the province was not estopped from claiming that the lease was invalid, the lessee's failure to obtain the Chief Commissioner's consent rendered the lease at most voidable and not void. In other words, the province had the discretion to elect how to treat the lessee's assignment of the lease. Although the province could have treated the assignment of the lease as void, instead it chose to continue to treat the lease as valid.

We find Canada's argument unconvincing. Canada learned of the assignment to Mr. Spencer within weeks of its occurring. If Canada had taken immediate action (such as referring the matter to a Judge of the Supreme Court), we doubt whether Mr. Spencer would have yet "relied" to such an extent that it would have been inequitable for the province to claim that the lease was invalid.

In addition, in our view the question is not so much whether the province *did* continue to treat the lease as valid, but rather whether it *had to* continue treating the lease as valid. The point here is that the province used the lease as its excuse for disallowing Mr. Sproat's allotment. This was not a legitimate excuse if it was within the province's means to terminate the lease. In other words, unless the province was obligated to continue treating the lease as valid, it was unreasonable for it to rely on the existence of the lease to disallow the allotment on Cormorant Island.

---

[170] Submissions on Behalf of the Government of Canada, September 11, 1995, p. 56.

The claimant attacked the validity of the lease on a number of other grounds. In particular, the claimant argued that:

- The lands purportedly leased by Messrs. Huson, Wilson, and Wadhams were presumably for pastoral purposes pursuant to the *Land Ordinance* of B.C., yet they were not used for those purposes. Mr. A.W. Huson apparently ultimately built a cannery. The *Land Ordinance* also permitted the lands to become "reserve" with merely a proportionate decrease in rent. In addition, the lands that were purportedly leased were clearly an Indian settlement and thus exempted from pre-emption or lease.

- The lease became void as a result of the lessee's failure to pay rent.

- The lease was vague and inconsistent as to the area of the land which was encompassed by it (the whole of Cormorant Island or only 600 acres).[171]

We do not find it necessary to review these arguments here. After analysis and reflection, we have come to the view that the two terms of the lease and the circumstances discussed above gave Canada ample warning that Mr. Trutch's opinion was open to challenge. In addition, Canada was not limited to Mr. Trutch's opinion. As mentioned in Issue 1, Canada's own public servants, Indian Agent Blenkinsop and Indian Superintendent Powell, suggested that there were difficulties with the province's position in regard to the Cormorant Island allotment. Even Commissioner O'Reilly informed the Superintendent General of Indian Affairs that a portion of the land at issue was "the site of a large Indian village, and as such should never have been included in the lease granted to Mr. Huson."[172] We find, therefore, that Canada,

---

171 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 24.

172 P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

armed with all this information, did not fulfil its fiduciary obligation simply by obtaining the opinion of Mr. Trutch. Canada ought to have referred the matter to a Judge of the Supreme Court as it was entitled to and obligated to pursuant to the Order in Council appointing Commissioner Sproat. By failing to do so, Canada breached its fiduciary obligation to the claimant.

ISSUE 5

If the rejection of Commissioner Sproat's allotment of Cormorant Island had been referred to a Judge of the British Columbia Supreme Court, would Commissioner Sproat's allotment have been upheld?

Submissions of the Parties

Canada asserts that even if the steps it took to deal with the "difference" between Commissioner Sproat and the Chief Commissioner of Lands and Works were not reasonable, there is no evidence that the decision of a Judge of the Supreme Court would have differed from the lands eventually allotted to the claimant by Commissioner O'Reilly. On this point, Canada notes that before becoming Indian Reserve Commissioner, Mr. O'Reilly had been a stipendiary magistrate and later a county court judge.[173]

The claimant submits that the overwhelming weight of the evidence would have militated against the position of the Chief Commissioner of Lands and Works and in favour of Commissioner Sproat's allotment. Therefore, if Canada had referred the matter to a Judge of the Supreme Court, the claimant would have received

---

[173] Submissions on Behalf of the Government of Canada, September 11, 1995, p. 41.

approximately 1250 acres of Cormorant Island as a reserve or, at the very least, much larger portions than the 52 acres it was allotted by Commissioner O'Reilly.[174]

Outcome of a Referral to a Judge

We are unpersuaded by Canada's suggestion that a Judge would have come to the same conclusion as Commissioner O'Reilly. Even though Commissioner O'Reilly had been a county court judge, he was not acting in that capacity when he made his allotments on Cormorant Island. We assume that the purpose of choosing a Judge of the Supreme Court as referee was to obtain the decision of an impartial third party free from political influence. In his role as Indian Reserve Commissioner, Commissioner O'Reilly was not free from political influence.

The truth of the matter is that we cannot know with certainty what a Judge would have done if Canada had followed the dispute resolution process set out in the various Orders in Council anymore than we can know with certainty what a Judge will do in modern-day litigation. Until a case is heard and judgment rendered, the result is in question. We make no attempt to determine what the outcome of a referral to a Judge would have been. In the circumstances of this claim Canada's duty was to refer the matter to a Judge, not to second guess the outcome of such a referral.

However, we do wish to comment briefly on some of the submssions made by the parties. In addition to the arguments mentioned above regarding the validity of the lease and the grounds for its termination,he claimant alleges that the following facts would have been before the Judge:

---

[174] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 23-24.

- The province had agreed that it would interfere with Mr. Sproat's allotment only "in extreme cases." No evidence had been put forth by the province that this was an "extreme case."

- Both levels of government had agreed to Mr. Sproat acting as sole Reserve Commissioner. While the Chief Commissioner of Lands and Works protested Mr. Sproat visiting and allotting reserves on the northwest coast of British Columbia, this was, as even Mr. Trutch noted, "of questionable validity" and an "expression of opinion."

- The federal and provincial governments had agreed to share the costs of the "Referee"; as such, only half of the economic burden would fall on the federal government.

- Cormorant Island had been a traditional village of the Band and had been reduced in size only because of the decimation caused by the smallpox epidemic of 1837-38.

- The population of the Band was expanding and they needed additional land as a result. This need was exacerbated by its dependence on the fishery. The land ultimately allotted to the Band was insufficient for its purposes.

- Mr. Sproat had taken into account the fact of the lease and had negotiated with Mr. Huson and Reverend Hall. Both Mr. Huson and Reverend Hall had agreed to Mr. Sproat's allotment premised upon their obtaining the Crown grants of the 160 acres that they each sought. In fact, Mr. Sproat's allotment was based upon what Mr. Huson suggested.[175]

Although we do not propose to analyze the validity of each and every point in detail, we find the following arguments persuasive and supported by the evidence:

First, as explained above, it was within the province's power to terminate the lease. Second, there was evidence from various sources that a large Indian village

---

[175] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 17-18, 23-24.

existed on the leased land and that Alert Bay was the traditional home of a large Indian population.[176] Canada admits that it is likely that a winter village existed on the island at the time the lease was signed. It argues, however, that the claimant has not shown that its winter village extended beyond the areas which were allotted by Commissioner O'Reilly and which today form the reserves on the island.[177] We do, however, have the evidence of the elders in this inquiry that the whole of Cormorant Island was used, not only for food- and wood-gathering but also for burials. Presumably similar evidence would have been available to Canada in the 1880s on proper investigations.

Third, there was evidence from both Indian Agent Blenkinsop and Reverend Hall that the lessee, Mr. Huson, had consented to the allotment proposed by Commissioner Sproat. Indian Agent Blenkinsop stated as follows: "The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects."[178] This interpretation of events was supported by Reverend Hall:

---

[176] See, for example, Commander H.N. Mist to Captain Algernon Lyons, April 1, 1870 (ICC Documents, pp. 5-15); I.W. Powell, Indian Superintendent, to the Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201); George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22); I.W. Powell, Indian Superintendent, to P. O'Reilly, February 26, 1884 (ICC Documents, p. 223); I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224); P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

[177] Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 58-59.

[178] George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

> In 1880 the Church Miss[n] Society proposed establishing a Mission for the Indians on Cormorant Island with the consent and invitation of AW Huson then the lessee of the island. At this time Mr G Sproat was laying off Indian reserves in our neighbourhood and I informed him of my desire to commence a mission on the island. Mr Huson proposed to Mr Gilbert Sproat that the Government should cancel his lease, give him a free grant of 160 acres and make the balance an Indian Reserve. In Mr Gill Sproat's map of the island two sections of 160 acres each were marked off as land to be applied for by AW Huson & AJ Hall.[179]

Therefore, far from interfering with the claims of the white settlers on Cormorant Island, Commissioner Sproat's allotment specifically took their interests into account. Canada argues, however, that Commissioner Sproat did not have the authority to bind the province to give a Crown grant to Mr. Huson.[180] We acknowledge that Commissioner Sproat could not compel the province to give Mr. Huson a Crown grant. However, by entering into the reserve commission process, the province had expressed its willingness to resolve the Indian land question. Commissioner Sproat devised a solution which could have been implemented by the province and which would have satisfied the white settlers on Cormorant Island. The province did not offer any valid reason for its refusal to issue the Crown grant.

Although, strictly speaking, it was unnecessary for the establishment of a valid specific claim, we find that the claimant has provided sufficient evidence to show that Canada could have presented a strong case to a Judge of the Supreme Court. As such, if Canada had fulfilled its obligation to the claimant, there is every reason

---

[179] Alfred James Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

[180] Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 45-46.

to believe that Canada might have succeeded in having Commissioner Sproat's allotment upheld, or at least in obtaining a larger portion of land than 48.12 acres.

ISSUE 6

Was Canada negligent in not referring the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court or to the Secretary of State for the Colonies?

As an additional argument, the claimant submits that Canada was negligent. More specifically, the claimant argues that

(a) Commissioner Sproat's allotment of most of Cormorant Island was an operational decision rather than a policy decision, and is therefore subject to a claim in tort;

(b) Canada owed a duty of care to the claimant;

(c) there are no considerations that might negate or limit the scope of the duty or the class of persons to whom it was owed; and

(d) Canada's failure to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court or to the Secretary of State for the Colonies directly caused the claimant the loss of most of its settlement on Cormorant Island.[181]

Given our conclusions in Issues 1 and 2 above that Canada had either a mandatory or a fiduciary obligation to refer the matter to a Judge of the Supreme Court, we do not find it necessary to explore the claimant's added allegation of negligence.

---

[181] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 25-28.

ISSUE 7

Does this claim fall within the scope of the Specific Claims Policy?

Submissions of the Parties

Canada contends that this claim does not relate to obligations of the federal government undertaken under treaty, requirements spelled out in legislation, or responsibilities regarding the management of Indian assets and, therefore, does not fall within the subject matter of a specific claim as set out in the Specific Claims Policy.[182] In particular, Canada argues that this claim does not relate to any of the four circumstances enumerated on page 20 of *Outstanding Business*.[183] For convenience, we repeat the relevant passage here:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

---

[182] Submissions on Behalf of the Government of Canada, September 11, 1995, p. 22. Canada's submission echoes the opening words of the "Foreword" on p. 3 of ***Outstanding Business***.

[183] Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 22-23.

iv) An illegal disposition of Indian land.[184]

First, Canada submits that there is no treaty or agreement between Canada and the claimant First Nation. Second, the Orders in Council which set out the process to allot reserves for Indian bands in British Columbia and under which Commissioner Sproat operated are not a statute; rather, they are an exercise of the Royal Prerogative. Finally, the third and fourth circumstances do not apply: "As the Band's claim relates to lands which were not set apart as reserve for the Band, they are not an Indian asset under the policy nor are they Indian lands."[185]

Canada adds that, if the claimant is alleging that those portions of Cormorant Island allotted by Commissioner Sproat but not subsequently allotted by Commissioner O'Reilly are nonetheless Indian assets or Indian lands owing to the traditional use of the lands by the claimant, the appropriate manner to deal with the claim is through the British Columbia Treaty Commission process.[186] Ms. Schipizky, counsel for Canada, noted in her oral submissions that the Specific Claims Policy specifically excludes claims based on unextinguished aboriginal title.[187]

The claimant submits that its claim relates to all four of the circumstances enumerated on page 20 of *Outstanding Business*. First, Commissioner Sproat, in making his allotment, reached an agreement that was an accommodation among the

---

184 *Outstanding Business*, 20.

185 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 23.

186 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 23.

187 ICC Transcript, September 21, 1995, p. 118. Ms. Schipizky referred to pp. 7 and 30 of *Outstanding Business*.

claimant, Mr. Huson, and Reverend Hall. The claimant asserts that Mr. Sproat, as the authorized representative of Canada, entered into the agreement with the implicit if not the express consent of Canada. Canada was therefore bound to do everything in its power to ensure that the agreement was effected. Second, the claimant submits that the claim relates to the breach of an obligation arising out of "other statutes pertaining to Indians and the regulations thereunder":

> The Federal Crown breached an obligation to protect the lands occupied by the Band from pre-emption or lease pursuant to the *Land Ordinance, 1865* and Section 91(24) of the *Constitution Act, 1867*. Although the Specific Claims policy only mentions the "*Indian Act* or other statutes pertaining to Indians and the regulations thereunder," it is submitted that this should be broad enough to cover Orders in Council relating to Indians. For example, the Order in Council whereby Mr. Sproat was appointed and the referral to a Judge of the Supreme Court was mentioned arose out of the effective appointment of Commissioner Sproat pursuant to the *Federal Enquiries Act* under which the prior Joint Reserve Commission had been appointed. Similarly, Article 13 of the Terms of Union, which is part of the Order of Her Majesty in Council admitting British Columbia into the Union, arose out of the provisions of the *British North America Act, 1867*, now the *Constitution Act, 1867*. Thus, when viewed as a whole, the Orders in Council putting into force the statutory provisions must be looked to and, it is submitted, clearly show an obligation to act in the best interests of the Band, which said obligation was breached in this instance.[188]

Third, the claimant argues that upon Commissioner Sproat's allotment, the lands to be reserved became an asset of the claimant, most of which was lost when the reserve area was reduced from approximately 1250 acres to approximately 52 acres. Fourth,

---

[188] Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 34-35.

the claimant maintains that there was an "illegal disposition of Indian land." The claimant points out that the "lawful obligation" section of the Specific Claims Policy refers to "Indian land," whereas the next portion of the Policy, "beyond lawful obligation," refers to "reserve lands." As such, the claimant submits, the lands in question did not formally have to be reserve lands in order for there to be an obligation. The claimant argues that the lands in this case were Indian lands, in that they were used and occupied by the claimant.[189]

Scope of "Lawful Obligation"

As we have indicated in past reports,[190] it is our position that the four enumerated circumstances on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. We feel fortified in this opinion by the principles of interpretation enunciated by the Supreme Court of Canada in *National Bank of Greece (Canada) v. Katsikonouris*.[191] Mr. Justice La Forest, speaking for a majority of the Court, stated as follows:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, it is logical to infer

---

189 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 34-35.

190 ICC, *Homalco Band Inquiry Report*, December 1995, 85; ICC, *Primrose Lake Air Weapons Range II*, September 1995, 15.

191 *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 DLR (4th) 197 (SCC).

> that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.[192]

Here, of course, a general term (lawful obligation) precedes an enumeration of specific examples (the four enumerated circumstances). Therefore, following the reasoning of Mr. Justice La Forest, it is logical to infer that the purpose of providing the four specific examples was to remove any ambiguity as to whether those examples were included in the category of "lawful obligation".

It is not surprising that fiduciary obligations were not specifically listed as lawful obligations in the Specific Claims Policy. The Policy was, after all, written two years before the Supreme Court of Canada's decision in *Guerin* – the watershed case in terms of the Crown's fiduciary relationship to aboriginal peoples. What we do find surprising, however, is Canada's continued resistance to include such obligations within the ambit of the Policy in light of the Policy's underlying purpose. Our understanding is that the Policy was intended to provide for the settlement of legitimate, long-standing grievances, such as the matters at issue in this claim. Thus we find that this claim falls within the scope of the Specific Claims Policy.

Status of the Orders in Council

In any event, in our view, this claim falls within the circumstances enumerated on p. 20 of *Outstanding Business.*

---

192 *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 DLR (4th) 197 at 203 (SCC). See also, *Fegol v. N.M. Tilley Realty Ltd.* (1995), 99 Man. R. (2d) 41 (Man. QB).

We accept that Canada may be correct in its assertion that the Orders in Council under which Commissioner Sproat operated arose from an exercise of the Royal Prerogative. We certainly have found no clear indication in the Orders in Council that the effective appointment of Commissioner Sproat was "pursuant to the *Federal Enquiries Act*" as contended by the claimant. Even so, we agree with the claimant that the second circumstance enumerated under the Policy - "[a] breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder" - should be broad enough to cover the Orders in Council at issue in this claim.

Orders in Council have, at times, been equated with statutes. In their text, *Administrative Law: A Treatise*, R. Dussault and L. Borgeat write as follows:

> The purely conventional character of the Cabinet at the constitutional level does not mean that it can escape the obligation, in fulfilling the role of Governor General in Council or Lieutenant-Governor in Council, of resorting to the signature of the Queen's representative in order to validate certain acts of a legislative nature. These acts, once initialled, bear the name *Orders-in-Council*. They are generally published in the *Gazette* (in Quebec or at the federal level) and **are granted the same status as statute law before the courts**. Although the Order-in-Council is usually adopted pursuant to a statute which provides expressly for it, it may occur that the Cabinet, on its own authority, makes a decision by Order-in-Council without any resort to an enabling statute, pursuant to "the theory of its general powers" [Tr.]. . . .[193]

We note as well that in a previous inquiry before this Commission, Canada itself blurred the line between Orders in Council and "legislation". In our inquiry into the

---

193 R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1985), 1: 61. Bold emphasis added.

claim of the Homalco Indian Band, we examined the Order in Council appointing Commissioner O'Reilly which is of the same general type as the Orders in Council now under consideration in this inquiry.[194] In its written submissions for the Homalco Inquiry, Canada referred to Commissioner O'Reilly's Order in Council as "the legislation empowering O'Reilly".[195] Thus, at least for the purposes of the specific claims process, the difference between "legislation" (which normally includes statutes and regulations) and the Orders in Council empowering Sproat and O'Reilly is extremely slight.

We simply cannot countenance Canada's attempt to use the subtle distinction between a statute and a prerogative Order in Council to reject an otherwise valid claim. Therefore, in our opinion, the second circumstance enumerated under "Lawful Obligation" on page 20 of *Outstanding Business* must be interpreted to include obligations arising out of Orders in Council of the type at issue here. As found in Issue 1, Canada had a mandatory obligation pursuant to the Order in Council appointing Commissioner Sproat to refer the rejection of Sproat's allotment to a Judge of the Supreme Court. Accordingly, Canada's failure to follow this procedure was a "breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians." At the very least, it was the omission of a requirement "spelled out in legislation," to use the words of the former Minister of Indian Affairs and Northern Development in the "Forward" of *Outstanding Business*.[196]

---

194 Commissioner O'Reilly's Order in Council is included in the documents for this inquiry: Federal Order in Council, No. 1334, July 19, 1880 (ICC Documents, pp. 179-85).

195 See ICC, *Homalco Indian Band Report*, December 1995, 62, footnote 137.

196 *Outstanding Business*, 3.

Interpretation of the Policy

In his oral submissions, Mr. Ashcroft spoke of the frustrations engendered by a technical, narrow reading of the Specific Claims Policy:

> Now, I should say at this stage that I find it disturbing that the federal government would seem to be trying to hide behind what it says are specific policies or specific criteria in the specific claims policy. It seems to me that a lawful obligation means just that.
>
> If, in a court or something similar, it could be found that the Crown breached a lawful obligation, breached a fiduciary duty, was negligent, or whatever, towards an Indian band, then they should be liable. They shouldn't say, oh, well, we're only going to be held liable for this specific type of specific policy. I mean, if they want to be that restrictive, it's a complete farce.[197]

We are in essential agreement with Mr. Ashcroft's position. In our view, any technical, narrow interpretation of the Policy which would hinder the resolution of long-standing disputes should be avoided if other interpretations giving effect to the Policy's underlying purpose are equally plausible. Therefore, in our opinion, Canada's obligations under the Order in Council appointing Commissioner Sproat, and Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

---

[197] ICC Transcript, September 21, 1995, p. 54.

PART VI

FINDINGS AND RECOMMENDATIONS

We have been asked to inquire into and report on whether the Government of Canada properly rejected the Cormorant Island claim submitted by the 'Namgis First Nation. In assessing the validity of this claim for negotiation under Canada's Specific Claims Policy, we have considered a number of specific legal and factual issues. Our findings can be summarized as follows:

- Although the Order in Council appointing Commissioner Sproat (dominion Order in Council 170) states that any difference between the Commissioner of Lands and Works and Mr. Sproat is "to be referred" to one of the Judges of the Supreme Court, it also makes direct reference to the Order in Council of February 23, 1877, which states that the matter "might be referred" to one of the Judges of the Supreme Court. Therefore, it is likely that the words "might be referred" were incorporated into Order in Council 170. However, given the underlying objective of the reserve commission process – the speedy and final adjustment of the Indian reserve question in British Columbia – the word "might" in the Order in Council of February 23, 1877, should be construed as mandatory. As there was clearly a "difference" between Mr. Sproat and the Chief Commissioner of Lands and Works, and also between Canada and the Chief Commissioner of Lands and Works, with respect to the allotment on Cormorant Island, Canada therefore had a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court.

- Canada also had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court. Canada had unilateral discretion to refer "differences" between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. The exercise of this discretion had the capacity to affect the extent and locality of the lands to be held in trust for the use and benefit of the claimant and, thus, the claimant's legal and practical interests. Since the claimant could not, itself, refer disputes to a Judge of the Supreme Court or otherwise set apart lands for its use and benefit, it was vulnerable to the exercise of Canada's discretion.

- Canada did not fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion. The dispute-resolution process to which both Canada and British Columbia agreed was to refer "differences" between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court, and not to some other person chosen unilaterally by Canada. In any event, it was imprudent for Canada to ask Mr. Trutch to review the province's objection that a lease existed over the whole of Cormorant Island because Mr. Trutch had been the Chief Commissioner of Lands and Works at the time the lease was signed. Moreover, Canada had other evidence and opinions that there were difficulties with the province's rejection of Mr. Sproat's allotment and that, contrary to Mr. Trutch's opinion, the lease was not an insurmountable problem. Therefore, Canada ought to have referred the matter to a Judge of the Supreme Court. By failing to do so, Canada breached its fiduciary obligation to the claimant.

- The claimant has provided sufficient evidence to show that Canada could have presented a strong case to a Judge of the Supreme Court. As such, if Canada had fulfilled its obligation to the claimant, there is every reason to believe that Canada might have succeeded in having Commissioner Sproat's allotment upheld, or at least in obtaining a larger portion of land than 48.12 acres.

- The four enumerated circumstances under "Lawful Obligation" on p. 20 of *Outstanding Business* are examples only and are not intended to be exhaustive. Other circumstances such as the breach of Canada's fiduciary obligation should be included in the general category of "lawful obligation". In addition, the second circumstance enumerated under "Lawful Obligation" on p. 20 of *Outstanding Business* - "[a] breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder" - should be interpreted to include obligations arising out of Orders in Council of the type at issue in this claim. Since Canada had a mandatory obligation pursuant to the Order in Council appointing Commissioner Sproat to refer the rejection of Sproat's allotment to a Judge of the Supreme Court, Canada's failure to follow that procedure was a breach of an obligation arising out of a statute pertaining to Indians.

We therefore make the following recommendation to the parties:

> **That the claim of the 'Namgis First Nation with respect to Cormorant Island be accepted for negotiation under the Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC	**Daniel J. Bellegarde**	**Aurélien Gill**
Commission Co-Chair	**Commission Co-Chair**	**Commissioner**

APPENDIX A

THE 'NAMGIS FIRST NATION CORMORANT ISLAND INQUIRY

1	Decision to conduct inquiry	March 2, 1995
2	Notices sent to parties	March 3, 1995
3	Planning conference	January 31, 1995
4	Community Session	April 20 and 21, 1995

The Commission heard from the following witnesses: Mary Hanuse, Ethel Alfred, Peggy Svanvik, George Cook, Bill Cranmer, Agnes Cranmer. The session was held at the U'mista Cultural Centre, Alert Bay, BC.

5	Legal argument	September 20 and 21, 1995
6	Content of the formal record	

The formal record of this inquiry is comprised of the following:

- Documentary record (2 volumes of documents)
- 6 Exhibits
- Transcripts (3 volumes, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record of this inquiry.